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MAJ REES ALBERT C

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THE VIEWS EXPRESSED IN THIS ARTICLE ARE THOSE OF THE AUTHOR AND DO NOT REFLECT THE OFFICIAL POLICY OR POSITION OF THE UNITED STATES AIR FORCE, DEPARTMENT OF DEFENSE, OR THE U.S. GOVERNMENT

U.S. Military Commissions and Fundamental Guarantees for the Accused: Fixing the Rules to Meet Minimum Standards of International Humanitarian Law

Albert C. Rees Jr.

In fulfillment of the LL.M. Graduate Paper requirement

International Law of Armed Conflict Seminar, LAWG-936-08, Spring 2002
Professor David Kaye

U.S. Military Commissions and Fundamental Guarantees for the Accused: Fixing the Rules to Meet Minimum Standards of International Humanitarian Law

Albert C. Rees Jr. [1]

"Everyone shall be entitled to benefit from fundamental judicial guarantees.
No one shall be held responsible for an act he has not committed."
International Committee of the Red Cross[2]

I.

A Full and Fair Trial

Military Commission trials:

should be structured and have rules that ensure a full and fair trial for the accused, under international law[3], while permitting military commissions flexibility to consider evidence, protect sensitive information, and maintain security;

because to be legitimate, trials by a military commission must be an effective tool for the government that neither violates nor appears to violate the accused's legal rights.

In response to the September 11, 2001, terrorist attacks on the United States, the President has directed the establishment of military commissions. These military tribunals are to be available to try non-nationals accused of violations of the laws of war in the context of the "war on terrorism." The U.S. decision to possibly use military commissions to try international terrorists and their supporters has received significant criticism at home and abroad. Organizations as diverse as the American Bar Association and Human Rights Watch have expressed concern that such specially constituted tribunals

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[1] Major Rees is a judge advocate in the U.S. Air Force, currently assigned to the Defense Institute of International Legal Studies. The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

[2] International Committee of the Red Cross and League of Red Cross Societies, *Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts*, International Review of the Red Cross, Sept.-Oct. 1978, at 248 (English).

[3] Of course, military commissions must provide accused with fundamental protections required under U.S. law, a topic beyond the scope of this paper.

may not provide fundamental protections to the accused.[4] It is clear that military commissions are being subjected to close scrutiny to see if they will provide a full and fair trial. The idea that the United States would *not* provide minimal safeguards to an accused, terrorist or otherwise, contradicts Americans' faith in the rule of law.

The Department of Defense has recently released its rules and procedures for military commissions, in a document titled, Military Commission Order No. 1 (hereinafter "MCO No. 1").[5] These rules and procedures are an attempt to provide a fair balance between the ability of the government to successfully prosecute suspected terrorists and the rights of those suspects. Military Commission Order No. 1 is shaped by the President's directive, the potential threats to national security, the safety of personnel involved in trials, and the nature of the evidence that may be presented at trial. The most worrisome factor is the fact that trials by military commissions are likely to be outside the jurisdiction of any other U.S. law, without the protections for the accused that are normally demanded by the U.S. Constitution. This is a void that must be filled.

Although persons subject to trial by military commissions may not have the benefit of the U.S. Constitution, the U.S. is obligated to provide them with fundamental guarantees under international law. International humanitarian law and human rights law both provide minimum international standards for the protection of the accused.

This paper tries to answer the following questions: What minimum international standards for the protection of the accused is the U.S. obliged to meet? Do the rules and procedures established for military commissions meet those minimum standards? If not, what action will cure the defects while

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[4] AMERICAN BAR ASSOCIATION TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS 17 (Jan. 4, 2002) [hereinafter "ABA Report"], *at* http://www.abanet.org/leadership/military.pdf; *Commission Rules Meet Some, Not All, Rights Concerns*, HUMAN RIGHTS WATCH, 21 Mar. 2002 [hereinafter "Human Rights Watch"], *at* http://www.hrw.org/press/2002/03/tribunals0321.htm.

[5] Department of Defense Military Commission Order No. 1, Mar. 21, 2002 [hereinafter MCO No.1], *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

permitting the President to keep as much control as possible over military commissions? This third question is framed in relation to the President because presidents typically do not wish to give up any powers they claim is granted to them as Chief Executive and Commander in Chief by the U.S. Constitution and existing legislation. Thus, unless Congress or the courts intervene, the most realistic recommendations for improvement are those that the Executive can make without sacrificing control over military commissions.

With these questions in mind, this paper compares the rules and procedures set forth in the MCO No. 1 with international standards for the protection of the accused. The basic sources for these standards are international humanitarian law and human rights law the United States recognizes as binding law. Although questions arise as to the nature of the conflict, this paper concludes that an international armed conflict has existed since the attacks of September 11, 2001. Further, those who are likely to be brought before a military commission are unlawful combatants who do not qualify as prisoners of war and are not afforded the special judicial protections of the Geneva Conventions. Nevertheless, all accused remain entitled to fundamental protections afforded to all under humanitarian and human rights law.

Military Commission Order No. 1 provides the accused with many fundamental protections. However, the rules and procedures for military commissions do not meet international standards for fair and full trials in two significant aspects. First, the overarching control by the Secretary of Defense in the selection and appointment of the commission members and defense counsel results in a tribunal without real or apparent independence. This violates international humanitarian and human rights fundamental guarantees of a trial by an independent tribunal and access to independent counsel. Second, the inability of the accused to appeal military commission judgements to a U.S. court violates the fundamental guarantee of independent judicial review.

These defects in MCO No. 1 can be cured. The first, lack of independence of the tribunal and defense, should be remedied by amending and supplementing MCO No.1. Recommended changes include: separating the Appointing Authority from the Secretary of Defense, establishing an impartial

nomination process for commission members, removing the Office of the Chief Defense Counsel from the control of the Appointing Authority, and prohibiting the Appointing Authority from evaluating these people's performance. The result will be a tribunal and defense that meet minimal international standards for independence in fact and in appearance, while permitting the Executive to retain authority over the military commission.

The second significant defect, lack of judicial review, cannot be remedied without the President relinquishing some control over military commissions. To meet minimum international standards for the protection of the accused, the President would have to permit judicial review of commissions' decisions. If the President refuses to relinquish this control, he should appoint distinguished civilians with significant judicial experience to the review panel, and amend MCO No. 1 to make the review panel's decisions binding. These actions would significantly mitigate the failure of MCO No. 1 to provide independent judicial review.

II.

THE PRESIDENT RESURRECTS MILITARY COMMISSIONS TO PROSECUTE TERRORISTS

"When lawless wretches become so impudent and powerful as not to be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked."
U.S. Attorney General James Speed, July 1865 [6]

Two months after the September 11 attacks and a month after the United States began its military campaign in Afghanistan, President Bush issued his widely criticized order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[7] In his order, the President found that international terrorists, including members of Al Qaeda, had attacked the United States on a scale that created a state of armed conflict and a national emergency. One of the measures he found necessary in response was to reestablish military commissions to try certain individuals for violations of the laws of war. Further, the President found that the normal principles of law and rules normally applied in U.S. courts would not be appropriate for military commissions. The President cited his Constitutional authority as Commander in Chief of the U.S. armed forces and U.S. laws as the basis for his authority to issue the order.[8]

Section 4 of the President's Order established a general set of rules and procedures for military commissions. First, military commissions would try all persons subject to the order; the commissions could impose any penalty provided by law, including the death penalty. Second, the Secretary of Defense was directed to issue rules and regulations for military commissions. The rules were to provide for:

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[6] THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 405 (Benn Pitman, ed. Funk & Wagnalls 1954) (1865).

[7] Notice: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)[hereinafter "President's Order].

[8] *Id.* The statutory authorities cited by the President are the "Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and 10 U.S.C.§§ 821, 836 (Uniform Code of Military Justice [hereinafter UCMJ] art. 21, 36). Although 10 U.S.C. §§ 821 and 836 do not specifically establish military commissions, the U.S. Supreme Court has held that Congress, by enacting the predecessors to these sections, recognized the military commission as appropriate tribunal for the trial of war crimes. Application of Yamashita, U.S. Phil. Islands 1946, 327 U.S. 1, 66 S.Ct 340.

- a full and fair trial,

- the military commission sitting as the triers of both fact and law,

- relaxed rules for the admissibility of evidence,

- closure of proceedings and limited disclosure of protected information,

- prosecution and defense attorneys,

- conviction and sentence by at least two-thirds vote of the members, and

- review and final decision by the President.[9]

In addition, the President's Order indicated that any person subject to the order would have no recourse to any U.S., foreign, or international court. The President retained his power to grant reprieves and pardons.[10] Thus, the President has established a special tribunal designed to give the U.S. the greatest latitude in prosecuting international terrorists subject to the order, while purporting to ensure a full and fair trial for accused tried by military commissions.

An initial determination central to the fundamental guarantees afforded the accused is whether a military commission is a "regularly constituted court."[11] International law obligates the United States, like every state, to try every accused before a "competent, independent and impartial tribunal established by law."[12] The legality of the establishment of military commissions to try terrorists is generally beyond the scope of this paper,[13] except as it relates to fundamental protections afforded the accused by

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[9] President's Order § 4.

[10] *Id.* at § 7.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75(4) [hereinafter "AP I"], *adopted* June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www1.umn.edu/humanrts/instree/auoy.htm.

[12] International Covenant on Civil and Political Rights, art. 14(1) [hereinafter "ICCPR"], *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www1.umn.edu/humanrts/instree/auob.htm.

[13] Much has been written on this topic. For arguments that military commissions have been lawfully established, *see*, Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591 (2002); Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18; Curtis A.

international law. Under the European Convention on Human Rights,[14] as interpreted by the European Commission and European Court of Human Rights, any tribunal not established by the legislature would not be "established by law."[15] However, this paper takes the approach adopted by the ICTY Appellate Chamber in *Prosecutor v. Tadić*,[16] holding that the ICTY itself was established by law in a manner consistent with international law, although not established by legislation. In analyzing the various approaches taken by the European human rights bodies, the Inter-American Commission on Human Rights, and the ICCPR Human Rights Committee, the Appellate Chamber noted that:

> The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.[17]

Thus, in relation to the accused's rights, military commissions have been "established by law" when they "provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."[18] The remainder of this paper is devoted to military commissions and the application of these international guarantees.

Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions* (2002) (DRAFT). For arguments that military commissions are not lawfully established, *see*, George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J. L. & PUB. POL'Y 635 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL'Y 653 (2002).

[14] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 6, para. 1, 213 U.N.T.S. 222, states, "...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *established by law*...." (emphasis added). Of course, the European convention and the interpretations of the European courts are not binding on the United States. However, comparison with the European system presents a particular view of human rights that is held by some of the United States' closest allies. European governments will certainly apply European interpretations to humanitarian and human rights law when working with the U.S. on important matters such as extradition of suspected terrorists to the U.S.

[15] Prosecutor v. Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, para. 43 (Oct. 2, 1995)[hereinafter "Tadic Jurisdiction Decision"], citing a number of European human rights cases that interpret the guarantee to "ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature."

[16] *Id.* at para. 41-47.

[17] *Id.* at para. 45.

[18] *Id.*

III.

INTERNATIONAL STANDARDS APPLY TO MILITARY COMMISSIONS

"The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land."
U.S. Attorney General Edmund Randolph, June 26, 1792 [19]

A. SOURCES OF APPLICABLE INTERNATIONAL LAW

Fundamental guarantees established by international law are in place to protect persons who may be tried by military commissions. This analysis of MCO No. 1 begins with sorting out the applicable international law that sets forth standards for criminal prosecution. Although the U.S. may choose to exceed these standards by providing greater protections to accused, the U.S. has obligated itself to comply with only the minimum standards legally binding through international agreements or customary international law.

Any determination of fundamental guarantees for persons brought before a military commission must draw from international humanitarian law and human rights law. The primary sources of humanitarian law relevant to military commissions are the 1949 Geneva Conventions[20] and customary laws of war[21] covering persons in the control of the enemy. The main source of relevant human rights law is the International Covenant on Civil and Political Rights (hereinafter "ICCPR").[22] Broadly speaking, humanitarian law applies during armed conflicts, while human rights law applies at all times;

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[19] 1 Op. Att'y Gen 27 (1792)

[20] Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter "GC III"], *adopted* Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter "GC IV"], *adopted* Aug. 12, 1949, 75 U.N.T.S. 287. The Geneva Conventions are available at http://www1.umn.edu/humanrts/instree/auoy.htm.

[21] This paper looks only at the customary law of war that the United States accepts as customary and binding.

[22] International Covenant on Civil and Political Rights [hereinafter "ICCPR"], *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www1.umn.edu/humanrts/instree/auob.htm.

humanitarian law focuses on protection of people affected by armed conflict and human rights law provides protections for all people.

Although distinct bodies of law, humanitarian law and human rights law are often applicable simultaneously.[23] The International Court of Justice has provided guidance on the relationship of humanitarian law to human rights law. In *Legality of the Threat of Use of Nuclear Weapons*, the Court determined that both human rights and humanitarian provisions to apply in times of armed conflict.[24] The Court recognized that the rules developed for peacetime must be sensibly integrated with laws of war.[25] Although initially separate, fifty years of development of human rights law has significantly influenced humanitarian law, such that they have become parallel in content and converging in the particular areas, such as due process of law.[26] In short, during times of armed conflict, military commissions are subject to both humanitarian law and human rights law.

B. APPLYING INTERNATIONAL HUMANITARIAN LAW

The scope and intensity of international terrorism has reached a level of international armed conflict, triggering the 1949 Geneva Conventions and customary law applicable to international armed conflict. Once triggered, this body of law applies fundamental humanitarian guarantees to everyone, even individuals who engaged in conduct that stripped them of greater protections afforded to lawful combatants or non-combatants. One of those fundamental guarantees is the right to a fair trial by an impartial and regularly constituted court.

Armed Conflict Triggers Humanitarian Law

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[23] Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 Am. U. L. Rev. 935, 938 (1982).

[24] Legality of the Threat or Use of Nuclear Weapons, at para. 25, 1996 I.C.J. 265, (July 8, 1996), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

[25] Michael J. Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM J. INT'L L. 417, 423 (1997).

[26] Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266 (2000).

Two factors define whether humanitarian law applies, to what extent it applies, and the rights afforded to persons subject to trial by military commissions. The first factor is whether acts of international terrorism rise to the level of armed conflict; the second is the status of the individuals subject to the President's Order. A solid argument, adopted by this paper, is the "war on terrorism" is an international armed conflict. The series of terrorist attacks by Al Qaeda on U.S. targets, culminating with the indiscriminate attacks of September 11, 2001, on U.S. soil and against military and civilian targets, rise to the level of international armed conflict. If any question remains as to the scope of the conflict, the U.S., NATO, and U.N. Security Council response has placed this conflict squarely into the international arena, triggering humanitarian law applicable to international armed conflict.[27]

Even Al Qaeda and Taliban are Afforded Judicial Protections

Once humanitarian law is triggered, every person is afforded some status.[28] A person's status will determine the protections afforded to him. In the case of members of Al Qaeda or other terrorist subject to the President's Order, it is highly unlikely that they would fall into any status other than that of an unlawful combatant. Al Qaeda followers and other terrorists do not meet the criteria for protection under the Third Convention (covering prisoners of war); most significantly, they do not conduct their

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[27] This position departs from the definition of "international armed conflict" found in the Geneva Conventions. However, the view is well supported: On September 14, President Bush declared a national emergency to exist because of the September 11 attacks. (Proclamation No. 7463, 66 Fed. Reg. 48,199) Congress, too, reacted to the attacks as an international armed conflict, passing a Joint Resolution paramount to a declaration of war. (Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001)) The U.N. Security Council regarded the September 11 attacks a threat to international peace and security and recognized the inherent right of individual or collective self-defense from such armed attacks. (S.C. Res. 1368 (Sept. 12, 2001), U.N. Doc. S/Res/1368 (2001)). For the first time in its history, NATO triggered its collective self-defense mechanism .

[28] Oscar M. Uhler & Henri Coursier, Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet, ed., A.P. de Heney, trans., 1958) at 51[hereinafter "GC IV Commentary"], *available at* http://www.icrc.org/eng/ihl. "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hand can be outside the law."

operations in accordance with humanitarian law.[29] Without protections of the Geneva Conventions, alleged terrorists subject to the President's Order apparently fall into a gap in humanitarian law.

This gap is filled by customary international law. Article 75, titled *fundamental guarantees*, of Additional Protocol I to the 1949 Geneva Conventions provides guidance as to the minimum safeguards required by customary law. The U.S. is not a party to Additional Protocol I, but the government considers much of Additional Protocol I and in particular article 75 to be a restatement of customary international law and binding on the US.[30] Thus, for the remainder of this paper, the analysis of an accused's rights under customary international law are based on references to Additional Protocol I (hereinafter "AP I) and the specific provisions of article 75.

Article 75 applies to persons who are in the hands of a party to the conflict and do not benefit from more favorable treatment under the Geneva Conventions or Additional Protocol I. This article directs the detaining state to treat all persons humanely in all circumstances and provides a list of minimum standards. Article 75's fundamental guarantee of a trial by an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure"[31] applies to alleged terrorists subject to the President's Order.

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[29] GC III art. 4, para. A. In the scheme envisioned by the drafters of the Conventions, the Fourth Convention (covering civilians) would cover anyone not protected by one of the other Conventions. Yet, a strict interpretation of the Fourth Convention leaves many individuals subject to the President's Order without protection of any of the Geneva Conventions, as these individuals are largely nationals of neutral or co-belligerent states such as Saudi Arabia or Great Britain. CG IV art 4-5. In any case, the minimal judicial protections afforded to unlawful combatants are essentially equivalent to those of Additional Protocol I, article 75.

[30] Remarks by Michael J. Matheson, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L.& POL'Y 419, 427 (1987). *See* Laws of War, 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 2, at 917-920, 919 (report of the US Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts by Deputy Legal Advisor Geroge H. Aldrich); S. TREATY DOC. NO. 100-2, at X (1987) (Letter of Submittal regarding Additional Protocol II by Secretary of State George P. Shultz);

[31] AP I art. 75(4).

Although the Geneva Conventions are arguably not applicable to Al Qaida and other terrorists, all of the Conventions provide safeguards of proper trial and defense to individuals accused of grave breaches or other acts contrary to the provisions of the Conventions. Article 146 of the Fourth Convention and common articles in the other Conventions[32] oblige states to either prosecute or extradite for prosecution individuals who have committed grave breaches of the Convention. Grave breaches are particularly serious crimes committed against protected persons or property, including "wilful killing, torture or inhumane treatment,...wilfully causing great suffering or serious injury to body or health,...taking of hostages and extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[33] Anyone brought before the military commission will most certainly be charged with grave breaches of the Fourth Convention. Article 146 requires that accused persons receive judicial protections not less favorable than those provided to prisoners of war under articles 105-108 of the Third Convention, discussed below. Thus, any Al Qaida member or other terrorist subject to the President's Order and charged with grave breaches has a right to the minimal guarantees set forth in articles 105-108 of the Third Convention and article 75 of Additional Protocol I.

The status of Taliban soldiers is generally the same as that of Al Qaeda followers. However, these individuals are much closer to the status of lawful combatants. Some say that Taliban detainees are in fact prisoners of war and the U.S. should afford them all the protections of the Third Convention, including substantive and procedural judicial requirements.[34] However, the U.S. position that they are not entitled to prisoner of war protections is reasonable, and adopted by this paper. Taliban forces do not clearly fall within the parameters set forth in the Third Convention or Additional Protocol I. In particular,

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[32] GC common art. 49/50/129/146. These are articles common to each of the four Geneva Conventions.

[33] GC IV art. 147. Similar lists are at GC I art. 50, GC II art. 51, and GC III art. 130.

[34] Human Rights Watch, *supra* note 4.

the Taliban are not believed to conduct their operations in accordance with the laws and customs of war, and thus lose protections of prisoners of war under the Third Convention.[35]

Taliban members receive fundamental judicial guarantees under article 75 of Additional Protocol I and articles 105-108 of the Third Convention, based on the same reasoning that these provisions apply to Al Qaeda followers.[36]

The position taken by the U.S. is that Al Qaeda members are not entitled to protections of the Geneva Conventions at all and that Taliban members are not entitled to the protections afforded prisoners of war. The U.S. understands that this position does not absolve the U.S. from providing fundamental judicial protections to those subject to the President's Order. International humanitarian law requires the fundamental guarantees as set forth in article 75 of Additional Protocol I and articles 105-108 of the Third Geneva Convention. The U.S. is obligated to ensure the rules and procedures of military commissions afford the accused these safeguards.

C. APPLYING HUMAN RIGHTS LAW

The United States is obligated to apply human rights law as well. This analysis is much simpler than the one for the application of humanitarian law. As a party to the International Covenant on Civil and Political Rights, the U.S. has bound itself to provide all individuals subject to its jurisdiction with the protections set forth in the treaty.[37] Article 14 of the ICCPR provides a set of minimum guarantees to any accused brought before any tribunal. The Human Rights Committee, established by the ICCPR and a

[35] GC III art. 4; AP I art 1; The status of Taliban detainees defaults to the Fourth Convention. Their status as unlawful combatants, however, affords them minimal protections under the Fourth Convention, and no substantive protections not provided by AP I article 75. GC IV art 4, 5.

[36] Future combatants in the war on terrorism may be entitled to prisoner of war status if captured by the U.S. or its allies. In the event the U.S. finds itself opposing armed forces such as those of Iraq or Iran, the U.S. would have to determine whether the forces generally meet the requirements for protection under the Third Convention. Prosecuting prisoners of war would require the U.S. to comply with significantly more rules set forth in the Convention.

[37] ICCPR art 2. *See* Schindler, *supra* note 23, at 938.

principle body interpreting the treaty, has determined that article 14 applies to all courts and tribunals, whether ordinary or specialized, civilian or military.[38] Article 4 of the ICCPR permits states to derogate from most provisions of the treaty, including the judicial protections provided by article 14, in times of extreme national emergency. However, the U.S. has neither derogated from the ICCPR nor indicated it would do so.

Without a derogation of the provisions of article 14, military commissions are tribunals that fall within the ambit of the ICCPR. Thus, the U.S. must afford all accused subject to trial by military commissions the ICCPR's fundamental judicial guarantees.

D. MILITARY COMMISSIONS: BOUND BY HUMANITARIAN AND HUMAN RIGHTS LAW

Although humanitarian law and human rights law in the area of fundamental judicial guarantees is essentially the same, some differences do exist. These differences will be highlighted in the analysis of each section of Military Commission Order No. 1, below. In 1990, a group of human rights and humanitarian law experts set forth a list of minimum humanitarian standards they believed to be applicable in all situations.[39] Article 9 of this declaration, known as the Turku Declaration, tracks closely the judicial guarantees of AP I article 75 and the ICCPR article 14, and provides a good summary of the minimum international standards afforded to all accused in any tribunal:

Article 9

> No sentence shall be passed and no penalty shall be executed, on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

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[38] Human Rights Committee, General Comment 13, Article 14 (21st Session, 1984), para. 4 [hereinafter "General Comment 13"], *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 1 at 14 (1994).

[39] Declaration of Miniumum Humanitarian Standards (Turku Declaration) art. 9, U.N. Doc. E/CN.4/Sub. 2/1991/55 (Dec. 2, 1990).

a) the procedure shall provide for an accused to be informed without delay for the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;

b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

c) anyone charged with an offence is presumed innocent until proved guilty according to law;

d) anyone charged with an offence shall have the right to be tried in his or her presence;

e) no one shall be compelled to testify against himself or herself or to confess guilt;

f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;

g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

The ICCPR and the Third Geneva Convention add a final, significant standard: Everyone convicted of a crime shall have the right to appellate review of his or her judgment and sentence. The rules and procedures established by MCO No. 1 will be compared to these minimum humanitarian and human rights standards, in particular the provisions of AP I article 75(4), the ICCPR article 14, and GC III articles 105-108.

IV.

REVIEW OF MILITARY COMMISSION STRUCTURE, PROCEDURE, AND RULES: DO THEY MEET INTERNATIONAL STANDARDS?

"A fair trial in a fair tribunal is a basic requirement of due process.
Fairness of course requires an absence of actual bias in the trial of cases.
But our system of law has always endeavored to prevent even the probability of unfairness."
U.S. Supreme Court Justice Black, May 1955 [40]

A. SOME CONSIDERATIONS FOR ANALYZING MILITARY COMMISSION RULES

A few general comments are in order prior to inspecting MCO No. 1 in detail. These considerations flow through and shape the analysis, critique, and recommendations that follow.

Rules Must be Transparent and Unequivocal

The military commissions established by the President to try international terrorists and their supporters suspected of committing war crimes against the United States are bound to the same humanitarian standards for the protection of accused as any tribunal or court. In fact, military commission rules and procedures must both unequivocally guarantee and *appear* to guarantee the accused's right to a full and fair trial. Transparency is critical because military tribunals and special courts, especially those that try civilians, are often viewed with distrust.[41] The ICCPR Human Rights Committee has stated that the existence of military tribunals "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable *exceptional procedures to be applied which do not comply with the normal standards of justice.*"[42] (emphasis added)

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[40] In Re Murchison, 349 U.S.133, 136, 75 S.Ct. 623, 625 (1955).

[41] This distrust focuses on military courts trying civilians. On the other hand, a former director of America Watch recognized that "the traditional role of military tribunals (to judge offenses committed by military personnel on active duty) is normally not considered a human rights problem[.]" Comments of Juan Ernesto Mender, *in* workshop on *International Protection of the Independence of the Judicial Process*, 76 Am. SOC'Y INT'L L. PROC. 307, 317 (1982).

[42] General Comment 13, para. 4.

The very reason that the President is establishing military commissions is to have a forum with exceptional procedures that do not comply with the normal U.S. standards of due process, such as a jury trial and strict evidentiary rules. He has found that, "Given the danger to the safety of the United States and the nature of international terrorism,...it is not practicable to apply to military commissions...the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[43] While exceptional procedures may be warranted,[44] they bring a heightened need for transparent rules and procedures that unequivocally show that the military commissions will protect the accused's fundamental rights.

A Court-Martial Structure is Appropriate for Military Commissions

Using military tribunals to try individuals accused of war crimes is firmly embedded in international humanitarian law. The President's Order and MCO No. 1 set up military commissions that have many of the same characteristics of military courts-martial. For example, the military commission Appointing Authority has much the same role as the court-martial convening authority in U.S. practice, and the composition of the commission, military officers including a judge advocate, is much like the composition of a court-martial in UK practice.[45]

Yet, the fact that an accused – civilian or military – is brought before a military tribunal having a structure and rules consistent with military practice does not suggest that the accused's fundamental protections are being violated. The drafters of the Geneva Conventions were aware of the "wide powers...conferred on courts-martial,"[46] and believed that civilian courts are "generally less severe than

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[43] President's Order § 1(f).

[44] For an argument in favor of such exceptional procedures, *see*, Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

[45] United Kingdom Armed Forces Act 1996.

[46] JEAN DE PREUX, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 412 (Jean S. Pictet, ed., A.P. de Heney, trans., 1960) [hereinafter "GC III Commentary"], *available at* http://www.icrc.org/eng/ihl.

military courts."[47] Despite this, international humanitarian law puts individuals subject to trial for violations of the laws of war squarely before military tribunals. For example, article 84 of the Third Geneva Convention generally requires that prisoners of war be tried by military courts; articles 77 & 70 of the Fourth Convention permit an Occupying Power's military courts to try civilians accused of war crimes. After the Second World War, Allied military commissions, with their military structure and rules, tried thousands of civilians and soldiers accused of war crimes and crimes against humanity.[48] The U.S. alone tried more than 3,000 defendants in 950 hearings, handing down approximately 2,600 convictions and more than 400 acquittals.[49] International humanitarian law and state practice have established that military tribunals can provide a full and fair trial.

An Up-To-Date Analysis of Military Commissions Cannot Rely on Old Law

Many, including Secretary of Defense Donald Rumsfeld[50] and State Department Legal Advisor William Taft IV[51] have compared today's military commissions with those convened by the United States during World War II and earlier, implying that if military commissions were legal then, they are legal now. Yet, fifty years have passed since the last military commission, and both human rights law and humanitarian law have developed significantly. The Nuremberg and Tokyo tribunals and WW II military commissions certainly set the stage for modern humanitarian and human rights law. However, this paper does not compare the current military commissions against the international standards as they existed before the ICCPR, the Geneva Conventions, and the other significant developments that have changed the

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[47] *Id.*

[48] JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES, 267-268 (Greenwood Press 1971)(1954).

[49] *Id.*

[50] *For example, see*, Donald H. Rumsfeld & Paul Wolfowitz, Prepared Statement: Senate Armed Services Committee "Military Commissions", 12 Dec. 2001, *available at* http://www.defenselink.mil.

[51] William H. Taft IV, *U.S.Military Commissions: Fair Trials and Justice* (Mar. 26, 2002), *at* http://usinfo.state.gov/topical/rights/law.

face of international law. Instead, the benchmark for this analysis of the military commission's rules and procedures are the international standards applicable to the opening of the 21st Century.

This review looks at interpretations by humanitarian and human rights bodies such as the International Committee of the Red Cross, the ICCPR Human Rights Committee, the European Commission and Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia (herinafter "ICTY"). In addition, military commissions are compared to similar institutions, such as the U.S., United Kingdom, and Canadian courts-martial, an international institution, the ICTY, and some European civilian courts. This paper is seeking institutions with procedures that are like those in MCO No. 1 – seeking to justify the military commission rules based on a comparison with other systems.

B. DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 1, MARCH 21, 2002

Section 1: Purpose

Section 1 of MCO No. 1 sets the stage for the rules and procedures to be followed by military commissions. Most importantly, it directs those involved in military commissions to implement and construe these procures such that any accused receives a full and fair trial. Throughout, the Order repeats this theme, attempting to balance protections to the accused with flexibility to the prosecutor. However, simply ordering or exhorting subordinates to ensure basic guarantees in a general statement is not enough to overcome defects in the Order. All basic guarantees must be spelled out in detailed procedures and the defects must be cured. No matter how conscientious or concerned about providing a full and fair trial to the accused, the Appointing Authority, members, prosecutors, defense attorneys and other personnel are bound to comply with MCO No. 1 and the President's Order as written – fundamental guarantees must be built into the rules and procedures.

A further reason for clearly articulating fundamental guarantees in MCO No. 1 is the importance of any tribunal to not only *be* fair, but to *appear* fair. Both international and national courts have

recognized the appearance of fairness to the accused is a critical element in determining whether actual justice happens. In discussing whether the United Kingdom's court-martial process met European human rights standards, the European Court of Human Rights noted that, "In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance."[52] Similarly, the Canadian Supreme Court has asserted that "irrespective of any actual bias on the part of the tribunal, [the right to a trial by an independent and impartial tribunal] seeks to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias."[53] U.S. Supreme Court Justice Frankfurter stated it succinctly: "justice must satisfy the appearance of justice."[54]

Section 2: Establishment of Military Commissions

The MCO Rule – The Appointing Authority

The essential control over the military commission and associated personnel is established in Section 2 of MCO No. 1: the Secretary of Defense and his designee directly appoint *all* personnel involved in the military commissions. The Appointing Authority, should the Secretary choose to designate one, will presumably be a senior military officer or Department of Defense civilian, answerable directly to the Secretary. As we will see, other key personnel – members of the commission, prosecutors, detailed defense counsel, and members of the review panel – are to be military officers, or in the case of assistant prosecutors, may be Department of Justice attorneys who would work for the military Chief Prosecutor. The only individual not directly appointed by the Secretary of Defense or his Appointing Authority is civilian defense counsel hired by an accused. Thus, MCO No. 1 gives the Secretary great discretion in appointing and removing personnel involved with the military commissions, limited only by the directive that his decisions ensure that the accused receives a full and fair trial.

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[52] Findlay v. United Kingdom, 24 E.H.R.R. 211 (1997).

[53] R. v. Genereux, (1992) 1 S.C.R. 259, para. 36.

[54] Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11,13 (1954).

Comparison with Other Tribunals

The Appointing Authority is equivalent to a military convening authority. The concept of a Convening Authority, a commander who convenes courts-martial, refers cases for trial, and takes action on the judgment and sentence of the court-martial, is central to military practice in the U.S. and other nations. In U.S. practice, the authority and duties of the convening authority are established by law in the Uniform Code of Military Justice (hereinafter "UCMJ")[55], the statute that governs military discipline and courts-martial. The UCMJ is supplemented by the Rules for Courts-Martial[56], regulations prescribed by the President. The UCMJ authorizes the President, Secretary of Defense, and military commanders, among others, to convene courts-martial for trial of persons under their control.[57] In modern U.S. practice, convening a court-martial consists generally of:

- receiving from a subordinate commander formal charges against an accused,
- determining whether the charges should be referred to trial,
- creating a court-martial by appointing individuals within the command to constitute a court-martial panel,[58]
- appointing a judge advocate to prepare and prosecute the case, and
- referring the case to the court-martial.

A military judge is assigned to the case by a chief military judge not subordinate (usually) to the convening authority. The accused is entitled to a military defense counsel, also not subordinate to the

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[55] 10 U..S.C §§ 801, *et seq.*

[56] The Uniform Code of Military Justice, 10 U.S.C. §§ 80, *et seq.* [hereinafter UCMJ] and Rules for Courts-Martial [hereinafter "RCM"] are found in the Manual for Courts Martial [herinafter "MCM"]. The RCM are extensive (178 pages in the MCM, compared to 16 pages of MCO No. 1) rules for military criminal procedure.

[57] 10 U.S.C. §§ 822-824 (UCMJ art. 22-24).

[58] A court-martial panel fulfills the same role as a jury in a civilian trial. Like prospective jurors, the panel members are subject to questioning, challenges for cause and peremptory challenges by the prosecution and defense. RCM rule 912.

convening authority, or may hire a civilian attorney. The military judge presides over the pretrial and trial phases of the case. After trial, but before the appellate process, the convening authority reviews the results of the case, and may approve the judgment and sentence or take action to overturn a finding of guilt or lessen the sentence. Then, the case goes on appeal. More serious cases are automatically reviewed, *de novo*, by the Court of Criminal Appeals for the concerned armed force. These courts are composed of military judges. Cases reviewed by the Courts of Criminal Appeals may be reviewed by the civilian judges of the Court of Appeals for the Armed Forces. Finally, the Supreme Court may review decisions of the Court of Appeals for the Armed Forces.

This nutshell description of the court-martial process shows that the role of the convening authority is significant, particularly in getting a case to trial. However, an independent military judge, independent defense counsel, and independent judicial review significantly constrain the convening authority's power over the trial process. In addition, the UCMJ and Rules for Courts-Martial provide additional safeguards to prevent improper command influence by the convening authority and to ensure an independent judiciary. The U.S. Supreme Court has held that U.S. courts-martial meet due process requirements of the U.S. Constitution.[59]

The process followed by U.S. military tribunals is also consistent with the process requirements of Canada, based on the Canadian Supreme Court's favorable comments in *R. v. Genereux* on changes to the Canadian armed forces' trial procedures.[60] Even the decidedly civil-law-oriented European Court of Human Rights could find U.S. military practices to meet the minimum rights set forth in the European Convention. In *Findlay v. United Kingdom*, the court found UK court-martial process, prior to a revamping of the law, to be deficient.[61] The UK and U.S. courts-martial are similar, but many of the deficiencies the European Court found in the UK old process are not present in U.S. courts-martial. In

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[59] *See*, Weiss v. United States, 510 U.S. 163, 114 S.Ct. 752 (1994); OTHER CASES.

[60] *Supra*, note 53.

[61] Findlay v. United Kingdom, (1997) 24 E.H.R.R. 221.

particular, in U.S. practice the convening authority's role is more limited, a military judge presides over the trial, appellate review is automatic for serious cases, and the whole process is much more transparent. By analogy[62], the U.S. court-martial also guarantees the fundamental rights set forth in article 14 of the ICCPR and article 75 of AP I, because of the safeguards in place to prevent the convening authority from exercising undue control over the process.

Comparison with Minimum International Standards

Although the Appointing Authority described in MCO No. 1 is clearly based on the tried-and-true concept of the court-martial convening authority, the actual power of the Appointing Authority far exceeds that of any convening authority. MCO No. 1 vests the Secretary of Defense and his sole Appointing Authority with near-total, immediate control over the military commission.

This over-arching control of the process is the first of the two significant defects in MCO No. 1. (The other major defect is the lack of independent judicial review of military commissions.) The most fundamental judicial protection is, according to article 14 of the ICCPR, "everyone shall be entitled to a fair and public hearing by a competent, *independent* and *impartial* tribunal established by law." (emphasis added) Article 75 of AP I tracks this language, requiring trial by an "*impartial* and regularly constituted court...." (emphasis added) All other safeguards flow from these core requirements.

The conflict here is the notion that military commissions cannot be independent or reasonably appear to be impartial when all personnel serve at the pleasure of a single person. The Canadian Supreme Court, in *R. v. Genereux*, provides good guidance for considering independence and impartiality in the context of a military tribunal.[63] The Court distinguishes between concepts of independence and impartiality. The basic concerns are the same, but their focuses are different. "Impartiality refers to a

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[62] This paper assumes, without going into a comparative constitutional analysis, that the due process requirements of liberal-democratic states such as the US, Canada, and in Western Europe, meet or exceed the basic judicial guarantees set forth in the ICCPR and AP I.

[63] *Supra*, note 53.

state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' ... connotes absence of bias, actual or perceived."[64] Independence, embodies the traditional value of judicial independence, it connotes "a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."[65] Thus, impartiality revolves around whether the accused would have a "reasonable apprehension that the decision-maker...will be subjectively biased in the particular situation." In contrast, the independence of a tribunal is a matter of status, whether the tribunal is free from "interference by the executive and legislative branches of government but also by any other external force...."[66] Each of the bodies of the military commission – the members, prosecutor, defense, and review panel – are analyzed in detail in the comments on Section 4 of MCO No. 1, within the Canadian Supreme Court's descriptions in mind.

Recommendations for Fixing the Rule or Procedure to Meet Minimum International Standards

A first step in guaranteeing the independence and impartiality of military commissions would be the Secretary of Defense designating someone else as the Appointing Authority, pursuant to Section 2 of the Order. Mr. Rumsfeld is a very public figure whose views on Al Qaeda and the Taliban are well known. The nature of his position requires him to be a vocal advocate of President Bush's policies. Delegating the job of Appointing Authority would limit the Secretary's influence over military commission personnel by removing the commission from the direct, immediate control of the political appointee whose primary job is to prosecute and win the war against "foreign aggressors" and "vicious enemies."[67] Although anyone designated by the Secretary will be subordinate to him, the Appointing Authority should be as independent as possible while having the inherent authority to get the job done. The Appointing Authority should not be a political appointee, but someone with tenure in his or her

[64] *Id.* at para. 37.

[65] *Id.*

[66] *Id.* at para. 38.

[67] Donald H. Rumsfeld & Paul Wolfowitz, *Prepared Statement: Senate Armed Services Committee "Military Commissions"*, (Dec. 12, 2001), *available at* http://www.defenselink.mil.news/.

career. This person should not normally be directly subordinate to the Secretary; the Secretary should not be someone who rates, evaluates, or provides fitness reports for this person.

A good choice to be the Appointing Authority would be a senior general officer not directly involved in the shooting war against terrorism and far enough from the Secretary of Defense to be somewhat insulated from him. As a rule, the job of convening authority is just one role of a commander. The same can apply for the Appointing Authority, although the Appointing Authority need not be a commander.[68] The benefits of delegating appointing authority to this general officer go directly to the ultimate independence and impartiality of the military commission. The general would have career security and be less susceptible to concerns about the impact of his decisions on his or future. Out of the limelight, the general would be able to take impartial, reasoned steps to establish the commissions, provide administrative oversight, and independently review the commission's interlocutory questions, findings, and sentences. Another possible advantage is that the general officer is likely to have experience as a court-martial convening authority. Delegating appointing authority to a (relatively) independent general officer would help separate the military commissions from politics, and provide an additional safeguard to the independence and impartiality of the commission process. This first step would move the commission closer to the accused's rights under ICCPR article 14(1) and AP I article 75(4).

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[68] One possible choice is the vice-commander of the Strategic Command (STRATCOM). This unified command is responsible for the U.S. strategic nuclear deterrence, and, while providing support to combat operations, is not directly involved in the prosecution of the war. The vice-commander position is held by a lieutenant general or vice admiral, answerable to the STRATCOM commander. The Appointing Authority would need access to legal counsel, not the same as the Secretary's General Counsel. Independent legal advice also factors into the independence of the Appointing Authority, and hence the independence of the military commissions. A small staff assigned to the Appointing Authority or his or her legal counsel could administer the nomination, selection, and oversight process.

Section 3: Jurisdiction Over Persons and Offenses

The jurisdiction of military commission, set forth in MCO No. 1, Section 3, is generally beyond the scope of this paper, which is concerned with the rights of individuals who actually appear before military commissions. Jurisdiction goes to the very heart of the President's authority to establish military commissions, the status of individuals accused of offenses triable by military commissions, and the exact nature of the offenses. These threshold matters must be satisfactorily addressed before any of the other rules and procedures established by MCO No. 1 come into play. This paper proceeds with the assumption that the government has decided to charge someone and bring him to trial before a military commission.

Sections 4.A(1-3): Members

The MCO Rule

The focus of any determination of whether a tribunal can provide a full and fair trial is on the individuals who will be judging and passing sentence on the accused. In the case of military commissions, the members of the commissions will have the power to find a person guilty of the most serious of crimes and to sentence that person to the most serious of penalties – death.[69] Section 4 of MCO No. 1 establishes rules for the selection and duties of military commission members, the Presiding Officer (also a member), the prosecution, the defense, and other personnel.

The rules provide for the Appointing Authority[70] to decide on the size of a military commission, determine the qualifications someone needs to be a competent member, and individually select members. The commission must have between three and seven members plus an additional one or two alternate members. Members must be military officers on active duty and one must be a judge advocate.[71] In

[69] President's Order § 4(a).

[70] Any time the title "Appointing Authority" appears, recall that this individual is either the Secretary of Defense or his direct delegee. any time the title "Appointing Authority" appears, recall that this individual is either the Secretary of Defense or his direct delegee)

[71] Judge advocates in the U.S. military are commissioned officers who are licensed attorneys.

accordance with Section 1, members must be selected in a manner that ensures an accused of a full and fair trial. Finally, the Appointing Authority may remove members for good cause.

Comparison with Minimum International Standards

Without additional safeguards, such as those provided for in courts-martial, the selection process for military commission members meets requirements neither of independence nor impartiality, core rights of ICCPR article 14(1) and AP I article 75(4). These standards are not met because a single person, answerable only to top leaders of the executive branch, is responsible for selecting the commission members, without statutes or rules that eliminate or minimize the ability of the Appointing Authority to unduly influence the members.

Comparison with Other Tribunals – The Independent Military Judge

Other military judicial systems address independence and impartiality in different manners. For example the U.S. and United Kingdom courts-martial procedures vary in the selection process for court-martial members and judges, but each has taken steps to separate the appointing or convening authority from those who will hear a case. These steps give the court-martial the necessary independence and impartiality needed to ensure a fair trial for the accused.

Specific rules, found in the UCMJ, Rules for Courts-Martial, and other military regulations, limit the convening authority's control over the military judge and panel members. These rules protect the independence and impartiality of the court-martial. Unlike a military commission, which does not distinguish between the common-law roles of judge and jury, the court-martial has a military judge and a panel. Panel members are initially selected by the convening authority from personnel usually under his or her command. The military judge, on the other hand, is neither selected by or under the command of the convening authority (unless, of course, the convening authority is near the top, such as the President or Secretary of Defense).

Military judges are assigned to a separate agency directly responsible to the Judge Advocate General[72] of the concerned armed service, and may act as judges only when so assigned.[73] For example, United States Air Force judges are assigned to the Air Force Legal Services Agency, an organization that is not under the command of any convening. Judge advocates are usually assigned to a military judge position for at least three years; many have served as judges for much longer. A further protection of the military judge's independence is that no convening authority, or members of his or her staff, "may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge...which relates to his performance of duty as a military judge."[74] Convening authorities and any other commanders (to include the President and Secretaries) may not "censure, reprimand, or admonish" a military judge regarding any findings, sentence, or conduct of the proceedings.[75] Coercion and any other attempt to unlawfully influence the military judge are likewise prohibited.[76] The failure of the convening authority or other commander to comply with these rules could result in disciplinary action or criminal prosecution.[77]

These safeguards are seen by U.S. Supreme Court to protect the independence and impartiality of military judges.[78] In *Weiss v. United States*, Petitioner Eric Weiss, a Marine convicted by a court-martial, challenged the independence and impartiality of the military justice system. He claimed violations of his

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[72] The Judge Advocate General is the senior military attorney within an armed force.

[73] 10 U.S.C. § 826(c) (UCMJ art. 26(c)). *See*, United States v. Graf, 35 M.J. 450 (C.M.A. 1992), for an analysis of the applicable UCMJ, RCM, and Navy regulations protecting the independence and impartiality of the military judge in Navy courts-martial.

[74] UCMJ art. 26(c). *See* RCM 104.

[75] UCMJ art. 37(a). *See* RCM 104.

[76] *Id.*

[77] Persons subject to court-martial jurisdiction may be charged with a violation of UCMJ art. 98, noncompliance with procedural rules. If convicted, the maximum sentence is dismissal or dishonorable discharge from the service, forfeiture of all pay and allowances, and confinement for five years. *See*, MCM, Part IV, para. 22. However, there are no reported criminal cases of persons charged with violation of article 98.

[78] Weiss v. United States, 510 U.S. 163, 114 S.Ct. 752 (1994).

due process rights because military judges were neither appointed by the President with advice and consent of the Senate (as required for Federal judges) nor did they have a fixed term of office. The Court held that neither procedure violated Weiss' rights.[79] Relevant to this paper, the Court found that the UCMJ and corresponding regulations, including the rules discussed above, "by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality...."[80] In sum, distancing the military judge from the convening authority and rules aimed at preventing unlawful influence go a long way towards ensuring an independent and impartial tribunal.

Comparison with Other Tribunals – Preventing Unlawful Command Influence

Even in choosing panel members, the convening authority's influence is limited. The convening authority personally selects panel members who, in his or her opinion, "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," but cannot select someone who is an accuser, witness, investigating officer, or counsel in the case.[81] A selective process for choosing qualified members is not unique to the U.S. military. In Denmark, criminal court lay judges (citizens not trained in the law who sit with trained judges to decide cases) are chosen by a committee of members of local councils. A Danish scholar comparing the random nature of common law jury selection to this Nordic and German practice confidently asserts that Danish lay judges are "without doubt far better qualified than if they had been drawn by lot [,as in the Anglo-Saxon systems]."[82]

Of course, the problem is not in picking well-qualified members; it is the potential for improper influence a convening authority may have on the panel members. To overcome actual or perceived

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[79] *Id.* at 163 (1994).

[80] *Id.* at 179.

[81] UCMJ art.25(d)(2).

[82] Lars Bo Langsted *et al.*, *Denmark*, *in* 2 INTERNATIONAL ENCYLOPAEDIA OF LAWS *at* Denmark—121 (R. Blanpain, ed., 1993 & Supp. 1997). Citation omitted. Prospective lay judges are selected by committees of local councils in proportion to the population. From this pool, the two High Court presidents draw lots and make lists for each jurisdiction. Lay judges serve for four years and are expected to sit on four courts per year. The process of selection by the councils have resulted in highly qualified lay judges.

limitations on an accused's right to a fair trial, panel members enjoy the same protections from undue influence that are prescribed for military judges. The convening authority's influence is diluted further at trial by the process of questioning members, challenging for cause, and peremptory challenges by the prosecution and defense, to remove members from the panel.[83] Finally, the military judge presiding over a court-martial has the power to dismiss a case if he or she finds that the accused's right to a fair trial has been violated by unlawful command influence.

The military courts of the U.S. recognize that "[c]ommand influence is the mortal enemy of military justice"[84], and keep a careful eye on the conduct of convening authorities. Military appeals courts do not hesitate to overturn a court-martial judgement and sentence if an accused's fundamental rights to an impartial and independent trial has been violated by a military judge, convening authority, or any commander. This critical oversight of the military justice system is analyzed in the comments on Section 6.H(4) of MCO No. 1.

A comparison of these U.S. courts-martial rules and procedures for selecting members with those of the military commission's MCO No. 1 emphasize the concentration of authority over military commissions. Read alone, Sections 4.A(1)-(3) of the Order appear to give the Appointing Authority essentially the same power to appoint members as that of a convening authority. Unlike a convening authority, the Appointing Authority has few constraints on his or her discretion to appoint and remove members. Missing from MCO No. 1 are the rules found in the UCMJ and Rules for Courts-Martial that ensure the commission members have actual and apparent independence and are free to exercise impartial judgment.

Comparison with Other Tribunals – Removing the Commander from the Process

Other states protect the independence and impartiality of its military tribunals using different structures and procedures. For example, in 1996, the United Kingdom changed its time-honored court-

[83] UCMJ art. 14, RCM 912.

[84] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

martial practices to reflect developments in European human rights law and to overcome any perception of improper command influence.[85] After receiving a case from the accused's commanding officer, a senior officer, known as the "higher authority," decides whether to refer a case to the "prosecuting authority." The prosecuting authorities are the armed services legal branches. The prosecuting authority decides whether or not to prosecute and conducts the prosecution. Independent court administration officers are responsible for making arrangements for the court-martial, including selection of court-martial members who cannot be under the command of the higher authority. Each court-martial includes a judge advocate as part of the panel, who rules on legal matters and votes on sentence (but not on conviction). Post-trial appeal includes the accused's right to appeal to a civilian Courts-Martial Appeal Court.[86] The military justice system in the United Kingdom, unlike military commission rules, removes the decision to prosecute and the appointment of trial personnel from the convening authority. Also, unlike MCO No. 1, the UK permits civilian appellate review of convictions. A significant similarity is placing a judge advocate on the panel, with authority over legal matters. An analysis of this arrangement is presented in comments on Section 4.A(4) of the Order.

Recommendations for Fixing the Rule to Meet Minimum International Standards

The U.S. court-martial system focuses on a separate military judge and clearly defined prohibitions on undue command influence; the UK court-martial system separates the panel members from the commander. Each system has in place institutions and rules designed to provide an accused with an independent and impartial tribunal. By giving the Appointing Authority broad discretion over the members of the commission, MCO No. 1 neither distances the commander from the commission members nor establishes rules, parameters, or prohibitions to prevent actual or the appearance of improper command influence. Military commissions are, on their face, not independent.

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[85] *Supra*, note 45. (In response to European Commission on Human Rights and European Court of Human rights case, Findlay v. United Kingdom, (1997) 24 E.H.R.R. 221).

[86] *Id.* Summarized in Findlay.

A process for selecting qualified commission members and protecting accused's rights under the ICCPR and AP I is possible without scrapping the current rules.

First, the Secretary of Defense should not exercise his appointment authority but delegate it to a relatively independent senior officer, as described above in the remarks on MCO No. 1, Section 2. This would distance the commission members from the politically appointed Secretary and take the member selection process away from the person who will be reviewing military commission judgments and sentences and either recommending action to the President, or, if delegated, making final decisions on the commissions' findings. Not only would this remove some of the potential for improper command influence on the members, but would go far in appearing to do so.

Second, MCO No. 1 should be amended or supplemented to include specific provisions to protect commission members from improper command influence. These rules, described above, exist in the UCMJ and Rules for Courts-Martial, and can be brought into the military commission rules with ease. Unambiguous prohibitions on improper command influence and procedures for exposing and sanctioning improper conduct enhance the independence of the commission and provide the accused and the public with a benchmark for examining the relationship between the Secretary of Defense, the Appointing Authority, and the commission members' commanders.

Third, create rules that establish an impartial nomination process for selecting commission members. The commissions will need officers "best qualified by reason of their age, education, training, experience [and] judicial temperament."[87] The Appointing Authority must select these members, but can do so without hand-picking them and appearing to "stack the deck." The pool of military officers qualified to sit as commission members is huge; these officers are assigned to many different commands in the Army, Navy, Marines, and Air Force. The Appointing Authority's staff could create a database

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[87] 10 U.S.C. § 825(c)(2) (UCMJ art. 25(c)(2)); RCM 502.

containing qualified officers nominated by major commands of the services. For each military commission, the Appointing Authority could randomly select members from this database.

Fourth, do not place members under command of the Appointing Authority. The members should remain assigned to their respective services, commanded and evaluated by superiors not associated with the military commissions.

Finally, establish an independent appeal process. This fundamental guarantee is analyzed in the review of section 6.H., below. A judicial review serves to examine the relationship between the military commission, the Appointing Authority, and the Secretary of Defense. An independent appellate body can safeguard the independence of the commission and protect against improper command influence.

These steps to fix the MCO No. 1 rules for the selection of commission members would enhance the independence and impartiality of the military commissions, thereby enhancing protections for the accused as required by international law.

Section 4.A(4): The Presiding Officer

The military commission is not a jury, nor does a judge preside over the trial. Unlike the common-law jury, the members of the commission decide on the law as well as the facts and have significant control over the proceeding. With the addition of a judge advocate as a member, military commissions resemble the composition of United Kingdom courts-martial.[88]

Placing a judge advocate in the role of Presiding Officer is significant and welcome component of the commission. This attorney, as the Presiding Officer, will likely be the senior officer on the commission. He or she performs many of the functions of a military judge, generally controlling the flow of evidence, keeping order in the proceedings, keeping the trial moving along, and certifying interlocutory questions to the Appointing Authority. An important function of the Presiding Officer will be to

[88] *Supra*, note 45.

determine when the proceeding will be closed. Unlike a military judge, the Presiding Officer deliberates in closed sessions and votes on the judgment and sentence with the rest of the commission members.

A reader versed in U.S. common-law practice may balk at this commingling of judge and jury, concerned about lay-persons struggling with the intricacies of the law and about the lawyer having undue influence over the other members. These fears are unfounded and such a combination of learned judges and lay judges is found in the regular courts of other legal systems. For example, in Denmark, criminal trial courts are often decided by a panel of one learned judge and two lay judges and a High Court sitting as an appellate body may consist of three learned judges and three lay judges.[89] Other states such as Finland and Germany use lay judges alongside trained judges, as well.[90] Although not directly addressing this issue, Human rights bodies accept that a combination of non-legal and legal persons on a court does not violate an accused's fundamental judicial guarantees.[91]

In the absence of a separate judge presiding over a military commission trial, the placement of a judge advocate as a member of the military commission helps ensure that the accused is afforded the guarantees provided in MCO No. 1.

Section 4.A(5): Duties of the Presiding Officer

The Presiding Officer fulfills most of the functions of a military judge, generally controlling the proceeding after the Appointing Authority refers a case to a military commission. In particular, the Presiding Officer rules on the admissibility of evidence, determines if and when the trial should be closed, is responsible maintaining order during the proceeding, and controls the progress of the trial. In addition, the Presiding Officer handles interlocutory questions by either forwarding them to the Appointing

[89] *Supra*, note 45 at Denmark—119-120.

[90] *Id.*

[91] *See, for example,* Findlay v. United Kingdom, at para. 104 (European Commission of Human Rights comments on the lack of legally qualified members on UK courts-martial); Karttunen v. Findland, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992) (Human Rights Committee discusses disqualification individual lay judges for lack of impartiality).

Authority for a ruling or ruling on them him- or herself, depending on the nature of the issue. In addition to the duties set forth in this section of MCO No. 1, the Presiding Officer determines whether witnesses and documents for the accused's defense are necessary and reasonably available, ensures witnesses, documents, and other evidence are secured for trial, may order the accused to be excluded from the trial, may limit disclosure of protected information, determine the sufficiency of a guilty plea. After the trial, the Presiding Officer authenticates the record of trial and forwards it for review. The Presiding Officer is to perform all of these functions so as to ensure the accused receives a full and fair trial.[92]

These duties generally comport with the basic judicial guarantees of ICCPR article 14 and AP I article 75. In fact, these judicial functions are found in national and international courts, civilian and military, and are essential to a fair and orderly trial.[93] Two of the Presiding Officer's duties warrant further analysis at this point. First, Section 4.A(5)(c) directs the Presiding Officer to "ensure the expeditious conduct of the trial." This provision, along with Section 6.B(2) requiring the commission to proceed without unnecessary delay, comport with an accused's right to be tried without undue delay under ICCPR article 14(3)(c). The Human Rights Committee considers this right to relate to all stages of the judicial process, including the trial itself.[94] AP I article 75 does not provide for this right as a fundamental guarantee. MCO No. 1, as a whole, provide procedures that should result in an appropriate balance between a full and fair trial and a trial without undue delay.

The second issue is found in Section 4.A(5)(d), which directs the Presiding Officer to forward to the Appointing Authority all interlocutory questions that could terminate all or part of the proceedings. Such questions include, for example, whether the military lacks jurisdiction over the person or offense

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[92] The rules covering these duties are scattered throughout MCO No. 1.

[93] A review of various court rules reveals that judges of different legal systems exercise the same authority over proceedings. *See, for example*, RCM rule 801; Fed Rules of Criminal Procedure; Canadian Criminal Code, R.S.C., ch. C-46, §§ 552 *et seq.*; ICTY Rules of Procedure and Evidence,

[94] ICCPR General Comment 13, para. 10. The larger issue, beyond the scope of this paper, is the delay involved in bringing an accused to trial.

and whether the specification fails to state and offense.[95] Thus, the Appointing Authority, not the commission, would determine whether a case should be dismissed in whole or part. This provision goes back to the Appointing Authority's over-arching control of military commissions, and the lack independence of the commission, in violation of AP I and the ICCPR. In U.S. courts-martial, interlocutory questions, should the prosecutor choose to raise them, are forwarded to the appellate court for review.[96] To remedy this defect in military commission procedures, the rules should be amended or supplemented to give the military commission the authority to rule on such matters and to enable the prosecution to raise an interlocutory appeal to the review panel or other more appropriate appellate body.

Section 4.B: The Prosecutor

MCO No. 1 establishes a prosecutor's branch not unlike those of other judicial systems. Prosecutors are responsible for preparing charges and representing the government at trial and in any review process. Although not extensively defined in the Order, the duties of the military commission's prosecutor are consistent with U.S. military practice. In U.S. courts-martial practice, the convening authority's staff judge advocate[97] generally fills the role of the military commission's Chief Prosecutor. The UCMJ and Rules for Courts-Martial require the staff judge advocate to advise on military justice matters, review investigations and make recommendations to the convening authority on the disposition of cases, prepare charges for approval and referral by the convening authority, and ensure trial counsel are selected to prosecute the case.[98]

From the international perspective, the role and structure of the prosecution does not pose a threat to the accused's fundamental guarantees. Unlike military commissions, contemporary practice in the UK

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[95] RCM rule 907.

[96] RCM rule 908.

[97] A staff judge advocate is the principle legal advisor to a command. RCM rule 103(17).

[98] UCMJ art. 6, RCM 10; .RCM 502(d); UCMJ art. 34, RCM 406, 601(d)

courts-martial and the ICTY is to create independent prosecutors who answer, in theory, to no other authority.[99] However, in addition to U.S. courts-martial, many civilian jurisdictions have a single authority with control over the prosecutor and ultimately the decision whether to bring a case to trial. For example, elected district attorneys control most of the prosecutorial decisions in U.S. state criminal courts. In Denmark, the politically appointed Minister of Justice supervises the prosecution service and, along with the Attorney General, has the power to intervene in any case.[100] These examples show the internationally accepted practice of the prosecutor being answerable to a higher authority, even a political authority, who can directly influence the nature and scope of the prosecution.

Section 4.C: Defense Counsel

"Counsel may have access to [the prisoners] in the presence, but not in the hearing, of a guard." Military Commission Rules of Proceeding adopted May 8, 1865, for the trial of those charged with the assassination of President Lincoln.[101]

The MCO No. 1 Rule

A critical protection for the accused is his right to adequate and independent defense counsel. MCO No. 1 sets forth rules for the selection and responsibilities of the defense counsel who will represent the accused before military commissions.[102] The Office of the Chief Defense Counsel is a separate branch of the military commission structure.

Defense counsel are divided into two categories: military defense counsel appointed by the government and civilian counsel hired by the accused. A Chief Prosecutor, a judge advocate, will supervise the overall defense effort and manage subordinate defense counsel. The Chief Prosecutor will

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[99] *Supra*, note 45; ICTY Statute, art. 16.

[100] *Supra*, note 82 at Denmark—124-125.

[101] THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 21 (Benn Pitman, ed. Funk & Wagnalls 1954) (1865).

[102] MCO No. 1 § 4.C.

detail a military defense counsel to conduct the defense of each accused. MCO No. 1 requires this "detailed defense counsel" to "defend the Accused zealously within the bounds of the law and without regard to personal opinion as to the guilt of the Accused".[103] An accused may also request a specific U.S. military judge advocate to represent him, whether or not the judge advocate is assigned to the Office of the Chief Prosecutor. If available, this judge advocate would replace the detailed defense counsel as the accused's primary military counsel. The accused will have the services of military defense counsel free of charge.

In addition to military defense counsel, the accused may retain a civilian defense counsel, at no expense to the government.[104] MCO No. 1 requires that a civilian attorney meet certain criteria to represent the accused before a military commission. The civilian attorney must be a U.S. citizen, licensed to practice law in the US, and free from any sanction or disciplinary action as an attorney. In addition, the attorney must be eligible for access to SECRET or higher classified information. One inference from this rule is that the government could authorize the attorney to see such information. However, the rule specifically states that meeting these qualifications does not guarantee the civilian defense counsel's presence at closed hearings or access to protected information.[105] Finally, the civilian attorney must agree, in writing, to comply with the rules and instructions for counsel and the court. Given the multitude of lawyers in the United States, these criteria do not overly restrict an accused's access to civilian counsel.

Even when an accused retains civilian counsel, the detailed defense counsel will remain on the case. A military defense counsel will be assigned to represent the accused at all times.[106] The benefit to the accused is that, while the Presiding Officer may exclude the accused and civilian defense counsel from parts of the proceedings, the rules require the presence of the detailed defense counsel during all

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[103] MCO No. 1 § 4.C(2)(a).

[104] MCO No. 1 § 4.C(3)(b).

[105] *Id.*

[106] MCO No. 1 § 4.C(4).

parts of the proceeding.[107] In addition, detailed defense counsel will have access to all evidence admitted at trial, including protected information not made available to the accused or his civilian counsel.[108] One likely rationale for requiring a military defense counsel on the case is to provide a safeguard against security and safety breaches by the accused and his civilian lawyer.

Comparison with Other Tribunals

Of course, other judicial systems have procedures in place to provide the accused with defense counsel. Unlike the Office of the Chief Defense Counsel, as set out in MCO No. 1, the defense counsel in the U.S. military justice system is significantly more independent. Each armed force has a somewhat different structure for its defense counsel, but all have removed the defense from the control of the convening authority. For example, military defense attorneys in the U.S. Air Force are assigned to the Air Force Legal Services Agency, the same organization that includes Air Force military judges. Defense counsel are not under the command of the convening authority (unless the convening authority is a service secretary, the Secretary of Defense, or the President, and then insulated by layers of intervening command), and are evaluated and detailed by senior defense counsel. Military defense counsel are bound by special rules for representing their clients, and a strong culture of independence exists for the defense community.

The process set out in MCO No. 1 is very similar to U.S. courts-martial. The UCMJ and Rules for Courts-Martial recognize the accused's right to counsel, and set forth the criteria necessary for being a defense counsel.[109] An accused going before a court-martial has the right to a military defense counsel free of charge, may request a specific judge advocate to be his military defense counsel, and may hire a qualified civilian defense counsel at no expense to the government.

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[107] MCO No. 1 §§ 5.K, 6.B(3).

[108] MCO No. 1 § 6.B(3).

[109] UCMJ art. 27, RCM 502(d) & 506.

Civilian judicial systems tend to rely on the private bar or a legal services organization to provide indigent accused with defense counsel. In Canada, a judge who finds that an accused cannot afford to pay for an attorney will refer the accused to legal services organizations, if available, or appoint a private attorney to defend the case. Such legal services are either paid by the government or require the accused to pay strictly limited fees.[110] In Denmark, anyone accused of a significant offense is entitled to a court-appointed attorney at no cost to the accused.[111]

The ICTY does not have a defense counsel organization, but does have extensive rules for the appointment, qualifications and duties of defense counsel. The Statute provides the accused with the right to legal counsel of his choice, and free counsel if he is indigent.[112] Defense counsel must be admitted to the practice of law or be a law professor, must speak one of the languages of the tribunal or the native language of the accused, and are subject to the rules of the tribunal and the ICTY code of professional conduct for defense counsel.[113] For accused who are unable to afford an attorney, the ICTY has established a list of qualified counsel from which the tribunal will assign the case.[114] The tribunal pays for the cost of these assigned attorneys.[115] These attorneys have contracted with the ICTY to provide legal services, but are not a part of the organization.

Comparison with Minimum International Standards

The U.S. military justice system, Canadian and Danish courts, and the ICTY are examples of systems that provide the fundamental guarantee of a qualified defense attorney, as set forth in AP I article

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[110] Alan N. Young, *Canada*, *in* 1 INTERNATIONAL ENCYLOPAEDIA OF LAWS *at* Canada—20 (R. Blanpain, ed., 1993 & Supp. 1999).

[111] *Supra*, note 82 at Denmark—128.

[112] ICTY Statute art. 21(4).

[113] ICTY Rules of Procedure and Evidence, rule 44. ICTY Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal.

[114] ICTY Rules of Procedure and Evidence, rule 45

[115] *Id.* ICTY Directive on Assignment of Defence Counsel.

75 and ICCPR article 14. The Additional Protocol does not specifically set forth a requirement for a defense counsel. However, this requirement is assumed in article 75, providing that an accused be afforded the "generally recognized principles of regular judicial procedure," including "all necessary rights and means of defense".[116] The ICRC Commentary to AP I interprets paragraph 4(a) of article 75 to include assistance by a qualified defense lawyer, without which, the accused "would not have the benefit of all necessary rights and means of defense."[117]

The ICCPR further defines the accused's right to counsel. The accused must be able to defend himself through legal assistance of his own choosing and to communicate with his counsel. In "any case where the interests of justice so require," the state has an obligation to appoint counsel. If the accused cannot afford legal assistance, the state must provide for free counsel.[118] The Human Rights Committee provides guidance on these rights in a series of complaints against Uruguayan military courts. The Committee held that being forced to pick defense counsel from lawyers pre-selected by the military was a violation of the right to freely choose a defense counsel.[119] The Committee has also held that a military court cannot assign a lawyer for an accused in lieu of the accused's counsel of his own choosing. The court cannot prevent a qualified lawyer selected by the accused from representing him.[120]

The accused's right to counsel includes the right to private communication with his counsel. The Committee found Uruguay would be in violation of the ICCPR if the only way an accused could talk to her attorney was through a glass wall, over the prison telephone, with guards at their side.[121] This right to

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[116] AP I art. 75(4), 75(4)(a).

[117] International Committee of the Red Cross, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) at para. 3096 (hereinafter "AP I Commentary], *available at* http://www.icrc.org/eng/ihl.

[118] ICCPR art. 14(3)(b), 14(3)(d).

[119] Estrella v. Uruguay, Communication No. 74/1980, U.N. Doc. A/38/40 at 150 (1983).

[120] Acosta v. Uruguay, Communication No. _____, U.N. Doc. A/_____ (_____).

[121] Gomez de Voituret v. Uruguay, Communication No. 109/1981, U.N. Doc. A/39/40 at 164.

private communication is also found in the Third Geneva Convention for those accused charged with grave breaches. Article 105 of the Convention provides the right to counsel and, in preparation of the defense, the counsel "may, in particular, freely visit the accused and interview him in private."

In capital cases, the Committee has established that the interests of justice require that the accused be represented by counsel. This attorney must be competent and willing to defend the accused. Further, the court must permit a change in counsel if the accused so requests.[122] The possibility of the death penalty heightens the need for adequate counsel.

The accused does not have a specific right to an *independent* counsel. The ICCPR, AP I, and the Third Geneva Convention do not list this. However, regardless of whether the accused has selected his own counsel or the state has assigned counsel to him, the accused has a right to a lawyer who is willing an able to prepare and put on an adequate defense.

Recommendations for Fixing the Rule to Meet Minimum International Standards

The MCO No. 1 rules for defense counsel generally meet *minimum* safeguards for the protection of the accused. The accused before a military commission will have qualified counsel appointed for him. He may choose his own military counsel and may hire a qualified civilian counsel. Defense lawyers are directed to zealously defend their client. However, the lack of independence of the military defense counsel from the Appointing Authority and the absence of rules protecting the attorney-client relationship have the appearance of preventing the accused from putting on an adequate defense.

These two problems can be remedied by amending the MCO No. 1 rules. First, the rules should separate the Office of the Chief Defense Counsel from the Appointing Authority, to prevent the potential for and appearance of improper command influence. The armed services have robust, independent defense counsel organizations in place. Assign to one of these defense organizations the task of providing military defense counsel for military commissions.

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[122] Robinson LaVende v. Trinidad and Tobago, Communication No. 554/1993, U.N. Doc. CCPR/C/61/D/554/1993 (1997).

Second, incorporate rules into MCO No. 1 that protect the attorney-client relationship. Attach a "Defense Code of Conduct for Military Commissions" that unambiguously lays out the scope of representation, duty to provide an adequate defense, and ethical rules for counsel. Specifically provide for private communications as provided in current rules for civilian and military practice. One fear may be confidential communications may result in a threat to national security or the safety of personnel. However, existing Codes and Rules permit an attorney to break silence in certain situations. The military commission rules can provide the same safeguards. In any case, attorneys are bound by the rules of practice and ethics of their bars. The military commission rules and procedures should not conflict with these established rules.

Section 5: Procedures Accorded the Accused

Section 5 of MCO No. 1 lists a number of procedural safeguards that "shall apply with respect to the Accused".[123] These procedures, if implemented so as to ensure that an accused receives a full and fair trial,[124] provide the accused with a robust set of protections that meet or exceed the fundamental guarantees established by humanitarian and human rights law. Some of the protections provided the accused may be limited by the Presiding Officer, but such limitations do not violate minimum international standards for the protection of the accused.

The procedural safeguards listed in section 5 closely track the language of both AP I article 75(4) and ICCPR article 14, as well as the standards for trials of persons charged with grave breaches of the Geneva Conventions. The prosecutor is to provide, early enough to prepare a defense, the accused with a copy of the charges in a language the accused understands.[125] The substance of the charges, the

[123] MCO No. 1 § 5.

[124] MCO No. 1 § 1.

[125] MCO No. 1 § 5.A., AP I art.75(4)(a), ICCPR art. 14(3)(a), GC III art. 105.

proceedings, and documentary evidence will be provided in a language the accused understands.[126] In addition, the accused is entitled to interpreters to assist the defense.[127] Although not stated in MCO No. 1, presumably the government will provide interpretation services free of charge to the accused. The accused is presumed innocent until proven guilty beyond a reasonable doubt.[128] Defense counsel will be made available to the accused early enough to prepare a defense and through any findings and final sentence.[129] The accused is not required to testify at trial, but may choose to do so.[130] The accused's counsel may put on a defense and may cross-examine prosecution witnesses.[131] If an accused is found guilty, during the sentencing portion of the trial, the accused may make a statement and may submit evidence on his own behalf.[132] All of these procedural safeguards are essentially unrestricted, leaving the Appointing Authority or Presiding Officer little discretion in their application.

Other protections for the accused are potentially limited by the rules for access to protected information. Each of the following procedures include such a caveat. The defense is entitled to exculpatory evidence and evidence the prosecution intends to introduce at trial.[133] In addition, the accused may obtain witnesses, documents, and investigative resources, provided that they are necessary

[126] MCO No. 1 § 5.J., ICCPR art. 14(3)(a), GC III art. 105.

[127] MCO No. 1 § 5.J., ICCPR art. 14(3)(f), CG III art. 105.

[128] MCO No. 1 §§ 5.B., C., AP I art. 75(4)(d), ICCPR art. 14(2), General Comment 13 para. 7 (no guilt can be presumed until the charge has been proved beyond reasonable doubt.).

[129] MCO No. 1 § 5.D., AP I art. 75(4)(a) (the procedure shall afford the accused all necessary means of defense), AP I Commentary para. 3096 (all necessary means of defense includes assistance by a qualified defense counsel), ICCPR art. 14(3)(b) & (d), GC III art. 105.

[130] MCO No. 1 §§ 5.F., G., AP I art. 75(4)(f), ICCPR art. 14(3)(g), GC III art. 99.

[131] MCO No. 1 § 5.I., AP I art. 75(4)(a), (g), ICCPR art. 14(3)(b)(e), GC III art. 105.

[132] MCO No. 1 §§ 5.M., N. These provisions have no direct equivalent in AP I or the ICCPR.

[133] MCO No. 1 § 5.E., AP I art. 75(4)(a) (all necessary means of defense), ICCPR art. 14(3)(b) (adequate facilities for the preparation of the defense), General Comment 13 para. 9 (facilities must include access to document and other evidence), GC III art. 105 (necessary facilities).

and reasonably available.[134] If found guilty, the accused is entitled to evidence the prosecution intends to present during the sentencing portion of the trial.[135] As analyzed in detail, below, any protected information admitted into evidence for consideration by the commission must be presented to the detailed defense counsel. Also in accordance with international standards, the accused is entitled to be present at proceedings, unless the Presiding Officer closes the proceedings to the accused for national security or safety reasons or if the accused disrupts the proceedings. The accused's detailed defense counsel may not be excluded from any part of the trial proceeding.[136] This rule, also analyzed later in this paper, is consistent with AP I and the ICCPR, which do not grant the accused an unlimited right to be present at his trial.[137] Another limited right is that the accused's trial is to be open to the public, except for proceedings closed by the Presiding Officer.[138] Again, presented in detail below, minimum international standards permit closed proceedings when strictly necessary.[139]

The final protection listed in section 5 of MCO No. 1 is a double-jeopardy provision. Once a commission' finding of guilty or not guilty is final, an accused cannot be tried again before a military commission for the same charge. This rule meets the minimum standards of AP I and the ICCPR.[140]

The procedures accorded the accused closely track fundamental guarantees of international humanitarian law and human rights law. Section 5 does not need to be amended or supplemented to meet minimum standards for the protection of the accused. In fact, these safeguards should be a reference

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[134] MCO No. 1 § 5.H., AP I art. 75(4)(a) (all necessary means of defense) & (g), ICCPR art. 14(3)(b) (adequate facilities) & (e), GC III art. 105.

[135] MCO No. 1 § 5.L. These provisions have no direct equivalent in AP I or the ICCPR.

[136] MCO No. 1 § 5.K.

[137] AP I art. 75(4)(e), AP I Commentary para. 3109 (persistent misconduct by a defendant could justify his removal from the courtroom), ICCPR art. 14(3)(d), General Comment 13 para. 11 (recognizes that some trials may be held without accused present).

[138] MCO No. 1 § 5.O.

[139] ICCPR art. 14(1), GC III art. 105.

[140] MCO No. 1 § 5.P., AP I art. 75(4)(h), ICCPR art. 14(7).

point for the application of the other provisions of MCO No. 1. Can a commission member convict solely on the evidence without influence from the Appointing Authority or Secretary of Defense? Can the accused prepare an adequate defense because the government provides defense counsel with access to protected information? Will closed portions of a trial actually be and have the appearance of being fair because closures are judiciously limited? The answer will be "yes" if MCO No. 1's defects are cured and everyone associated with military commissions implements them fairly.

Section 6.B: Duties of the Commission During Trial

Section 6 of MCO No. 1 details the actual conduct of the proceedings, including pretrial, trial, and post-trial proceedings. Relevant to this paper are the duties of the commission during trial, especially the rules for closing the proceedings, the commission's rules of evidence including those for protection of information, and some of the proceedings during the trial related to commission voting and announcement of judgments and sentences. These rules generally meet minimum international standards for the protection of the accused.

The MCO Rule – Closed Proceedings and Excluding the Accused

The duties of the commission during trial include providing a full and fair trial, proceeding impartially and expeditiously, and holding open proceedings unless closure is justified under the rules.[141] The most controversial rule is the broad grounds for closure, which are: protection of information, safety of the participants, protection of intelligence and law enforcement procedures, and "other national security interests."[142] The Presiding Officer decides when to close all or part of a proceeding, and may exclude the accused, civilian defense counsel, or any other person except the accused's military detailed defense counsel. Although the detailed defense counsel can never be excluded from the proceeding, he or

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[141] MCO No. 1 § 6.B.

[142] MCO No. 1 § 6.B(3).

she may not disclose any information presented during a closed session to anyone excluded from the session, including the accused and civilian defense counsel. The Presiding Officer may authorize detailed defense counsel to disclose certain information to his or her client and civilian counsel.[143]

The rule states that "proceedings should be open to the maximum extent practicable." But gives the Appointing Authority discretion in closing the all or part of the proceedings and preventing attendance by the public or the press.[144] This raises the question of how the rules interpret the meaning of an "open" proceeding. Apparently, the Order contemplates a proceeding that does not exclude the accused but does exclude the public and press to be an "open" proceeding. The U.S. position on this broad rule for closing proceedings is that any case coming before a military commission would, by its very nature, be a high national security and safety risk. The MCO No. 1 rules for closing the trial and excluding the accused implicate separate judicial protections.

Comparison with Other Tribunals – Closed Proceedings and Excluding the Accused

An open trial is a fundamental part of other judicial systems as a right of the accused and important public policy beyond the accused's rights. But, these systems recognize limits on open proceedings. Court-martial practice in the U.S. follows a strong tradition of an open trial, even when both the prosecution and defense agree that it should be closed.[145] Unlike the ambiguous interpretation of "open" in MCO No. 1, a court-martial is "open" when spectators are permitted to be present. A court-martial that excludes spectators but not the accused is a closed proceeding.[146] The accused is entitled to be present at all proceedings except for *in camera* proceedings in which a military judge considers certain evidence relating to sex offense victims, classified information and privileged government information.[147]

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[143] *Id.*

[144] *Id.*

[145] Discussion to RCM 806(b).

[146] *Id.* A court-martial is not closed merely because certain individuals are excluded.

[147] MRE 412, 413, 414, 505, 506.

The Rules for Courts-Martial permits a military judge to close the trial without the consent of the accused only in specific situations where sex offense victim, classified, or privileged information is to be presented during the trial.[148] Even though the proceeding is "closed," the accused remains entitled to be present as this evidence is presented to the court. The U.S. recognizes that an open trial is not only a right of the accused, but in the public interest. The discussion to Rules for Courts-Martial 806 states that, "Opening courts-martial to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process. Absent an overriding interest articulated in findings, a court-martial must be open to the public."[149]

Like other judicial systems, the ICTY also provides that an accused is entitled to a public hearing and to be present at his trial.[150] However, these rights may be limited to protect victims and witnesses.[151] This limitation was challenged by the accused in *Prosecutor v. Tadić* when the prosecutor's requested protective measures for certain victims and witnesses. The trial chamber held that the rule permitting *in camera* proceedings and the protection of the victim's identity were acceptable reasons to limit the accused's right to a public trial, within the context of the court's Statute and Rules.[152] The ICTY also provides for closed proceedings for reasons of public order or morality, witness or victim protection, or for "protection of the interests of justice."[153] Other than limited *in camera* proceedings generally relating to the protection of victims and witnesses, the ICTY Statute and Rules do not exclude the accused from

[148] RCM 806, MRE 412, 413, 414, 505, 506.

[149] Discussion to RCM 806.

[150] ICTY statute art. 21.

[151] ICTY statute art. 22.

[152] Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, IT-94-1-T, para. 36 (Aug.10, 1995). Other trial chambers have upheld this rule. For example, *see* Prosecutor v. Delalić, *et al.*, *Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M"*, IT-96-21-T (Apr. 28, 1997).

[153] ICTY rule of procedure 79.

any part of the trial. The ICTY recognizes the great importance that trial should be open to the public. In the words of one trial chamber, "Justice should not only be done, it should also be seen to be done."[154]

Comparison with Minimum International Standards- Closed Proceedings

As suggested earlier, the accused's right to an open trial and the accused's right to be present at trial are separate issues. MCO No. 1, although broadly framed, meets the minimum requirements of customary international humanitarian law and the ICCPR for open proceedings. Article 75 of Additional Protocol I has no specific requirement for open proceedings. For those accused of grave breaches of the Geneva Conventions, CG III article 105 requires an open trial insofar as representatives of the Protecting Power have a right to attend. However, GC III provides that in exceptional situations, a trial may be "held *in camera* in the interest of State security." This important exception is recognizes that national legislation always provides for *in camera* hearings when necessary for security reasons.[155] Article 14 of the ICCPR specifically entitles an accused to a public trial, but permits a trial may be closed in exceptional circumstances. Such circumstances include morals, public order, national security "in a democratic society," to protect individuals' privacy, or where "publicity would prejudice the interests of justice".[156] In *Estrella v. Uruguay*, the Human Rights Committee held that a closed military trial of a civilian violated article 14 because the state failed to provide a valid reason for not providing a public trial.[157] The Committee has noted that "the publicity of hearings is an important safeguard in the interest of the individual and of society at large."[158]

As important an open trial is to the appearance of justice, the rules for closing military commission proceedings do not violate minimum international humanitarian or human rights protections

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[154] Prosecutor v. Kunarac, *et al.*, *Order on Defence Motion Pursuant to Rule 79*, IT-96-23-T, para. 5 (Mar. 22, 2000).

[155] CG III Commentary 492.

[156] ICCPR art. 14(1).

[157] Estrella v. Uruguay, Communication No. 74/1980, U.N. Doc. A/38/40 at 150 (1983).

[158] General Comment 13, para. 6.

for the accused. The reasons for closing all or part of commission proceedings are valid under CG III and the ICCPR. National security and the protection of individuals involved in the trial are appropriate, as seen in the practice of U.S. courts-martial and the ICTY. The key to successful handling of closed proceedings is to comply with the direction of MCO No. 1, section 6.B(3): "Proceedings should be open to the maximum extent practicable." When a commission proceeding must be closed, the Presiding Officer or Appointing Authority should, in an open portion of the trial, clearly articulate the specific reasons for closure.

Comparison with Minimum International Standards – Excluding the Accused

Excluding the accused from trial is not a *prima facie* violation of the accused's fundamental right "to be tried in his presence", as specifically set forth in AP I and the ICCPR.[159] In exceptional circumstances, such exclusion can be appropriate. The commentary to AP I notes the importance of the accused's presence at sessions where the prosecution puts on its case; the accused must be able to hear witnesses, ask questions, and make objections.[160] However, the Human Rights Committee appears to recognize a trial may be held *in absentia*, "exceptionally for justified reasons", but warns that when an accused is not present, "strict observance of the rights of the defence is all the more necessary."[161] The Committee has also held that when an accused is adequately represented by counsel, his absence during hearings or trial might not violate the ICCPR.[162] In addition, an accused charged with grave breaches of the Geneva Conventions does not have a specific right to be present at his trial; his counsel is expected to

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[159] AP I art. 75(4)(e), ICCPR art. 14(3)(d).

[160] AP I Commentary, para. 3110.

[161] General Comment 13, para. 11.

[162] Gordon v. Jamaica, Communication No. 237/1987, U.N. Doc. CCPR/C/46/D/237/1987 (1992). The complainant in this case alleged a violation of article 14(3)(d) because he was not present at his appeal hearing. He was, however, adequately represented at the appeal by three attorneys.

conduct the defense.[163] From this analysis, it appears that an accused adequately represented by counsel can be excluded from the commission proceedings in exceptional circumstances.

The bases set forth in MCO No. 1 for excluding an accused from the proceedings go beyond the circumstances permitted in U.S. courts-martial and the ICTY, but can meet the minimum international standards for the protection of the accused. The accused can only be excluded when protected information, participant safety, or national security interests are at stake. Even then, the detailed defense counsel must be present. The problem with this arrangement is the adequacy of the defense, as analyzed earlier in this paper. If military defense counsel is not independent and cannot put on an adequate defense because of the Order's built-in conflicts of interest, then he cannot adequately represent the accused in his absence. Fixing the military defense counsel rules will alleviate this problem. Finally, Presiding Officers and the Appointing Authority should always strive to allow the accused to be present; exclusion should be the exception, not the practice.

The MCO Rule – Speedy Trial

One last note on the duties of the commission as they relate to the ICCPR's requirement for a trial without undue delay.[164] MCO No. 1 requires the military commission to proceed expeditiously and directs the Presiding Officer to ensure the expeditious conduct of the trial.[165] These rules meet the requirement of a speedy trial once a case is in the hands of a commission. They do not protect the accused from undue delay from the time an investigation begins to the time the accused is charged with a crime. Nevertheless, absent an actual violation of the accused's right to a speedy trial, MCO No. 1 suffices to meet the minimum international standard set forth in the ICCPR. Article 75 of AP I does not provide the accused with a right to a speedy trial.

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[163] GC III art. 105.

[164] ICCPR art. 14(3)(c).

[165] MCO No. 1 §§ 4.A(5)(c), 6.B(2).

Section 6.D: Evidence and Protected Information

The MCO Rule – Admissibility of Evidence

The evidentiary rules laid out in section 6.D of MCO No. 1 have two primary characteristics: few limitations on admissibility and many limitations on use of protected information. Unlike the U.S. Military Rules of Evidence or the Federal Rules of Evidence, military commission rules for admissibility of evidence are simple. A military commission may consider any evidence that is relevant and has probative value.[166] Any testimony, in any form, sworn or unsworn, is admissible if it is not cumulative. Prior statements, in any form, sworn or unsworn, are admissible.[167]

Comparison with Other Tribunals – Admissibility of Evidence

For U.S. practitioners used to strict controls on the evidence that reaches the fact-finder, this may seem to be a gross violation of the accused's right to a fair trial. However, in civil-law systems, open rules for admissibility of evidence are common. For example, Denmark, with its mixed courts of trained and lay judges, has liberal rules permitting consideration of evidence. Witnesses may choose not to testify in a few privileged situations, and, in theory, evidence obtained in willful violation of the law is excludable from trial.[168] In Belgium, judges may consider any evidence legally obtained that has been subject to the objections of the parties.[169] The military commission rules of evidence comport with these other jurisdictions, with one significant exception. No rule prohibits a commission from considering evidence obtained unlawfully – in particular through coercion.

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[166] MCO No. 1 §§ 6.B(2), 6.D(1).

[167] MCO No. 1 § 6.D.

[168] *Supra,* note 82 at Denmark—131-137.

[169] Lieven Dupont & Cyrille Fijnaut, *Belgium, in* 1 INTERNATIONAL ENCYLOPAEDIA OF LAWS *at* Belgium—175-176 (R. Blanpain, ed., 1993 & Supp. 1993).

Comparison with Minimum International Standards – Admissibility of Evidence

As described above, AP I and the ICCPR provide that the accused is to be free from compulsion to testify against himself or to confess guilt.[170] The Additional Protocol rule is aimed at preventing torture or other "questionable means to extract a confession" from the accused.[171] The ICCPR rule focuses on coercive methods such as torture or cruel, inhuman or degrading treatment.[172] The military commission rules of evidence are deficient because they do not preclude evidence obtained through torture or cruel, inhuman or degrading treatment. MCO No. 1 should be amended to prevent the commission from considering such evidence. This amendment would protect the accused's right to be free from compulsion to confess guilt and protect others from coercive methods. This rule would not only provide greater protection for the accused and others, but would visibly enhance U.S. policy of not using such methods.

The MCO Rule – Protection of Information

Unlike the liberalization of evidence rules, MCO No. 1 places significant restrictions on the disclosure and use of protected information. "Protected information" includes classified information and other information protected by law or rule from unauthorized disclosure, information that may endanger the safety of participants, information concerning intelligence and law enforcement procedures, and information concerning other national security interests.[173]

Pursuant to MCO No. 1, the Presiding Officer may issue protective orders to safeguard protected information.[174] In addition, the Presiding Officer is required to limit the disclosure of protected information to protect U.S. interests and state secrets. Limiting disclosure can include the deletion of

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[170] AP I art. 75(4)(f), ICCPR art. 14(3)(g).

[171] AP I Commentary, para. 3111.

[172] General Comment 13, para. 14, *citing* ICCPR art. 7, 10(1).

[173] MCO No. 1 § 6.D(5).

[174] MCO No. 1 § 6.D(5)(a).

protected information from documents made available to the accused, detailed defense counsel, or civilian defense counsel; substitution of a summary of the deleted information; or substitution of a statement of facts that the protected information would tend to prove. The Presiding Officer would consider *ex parte* and *in camera* any materials that may be protected, to determine their relevance and the scope of disclosure. Despite the restrictions on disclosure of protected information to the defense, "no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel."[175] Apparently, the prosecution will not be able to try to prove its case using any information not available to the accused's detailed defense counsel. However, without permission from the Presiding Officer, the rules prevent the detailed defense counsel from sharing information presented in a closed proceeding with the accused or civilian defense counsel.[176]

Comparison with Other Tribunals – Protection of Evidence

Protection of classified and other sensitive information is not unique to the military commission rules. U.S. courts-martial have extensive procedures, set forth in the MRE, for the protection, consideration, and disclosure of classified and other sensitive government information.[177] The key provisions of the MRE and MCO No. 1 are the same, except that the accused and his counsel have somewhat greater access to protected information that the prosecution uses to prove its case. Other judicial systems recognize limitations on disclosure of protected information. For example, the ICTY has a rule that protects information obtained by the prosecutor from someone who wishes it remain confidential.[178] Such information may be used to generate new evidence, but cannot be introduced at trial without the consent of the person or entity initially provided it. Even if introduced as evidence, the trial

[175] MCO No. 1 § 6.D(5)(b).

[176] MCO No. 1 § 6.B(3).

[177] MRE 505, 506. The rules for protection of information consist of seven pages of detailed procedures, compared to the three paragraphs in MCO No. 1. As with most of MCO No. 1 rules that follow the military rules, the basic concept is retained but details and procedures for implementing the rule have been dropped.

[178] ICTY Rules of Procedure and Evidence 70.

chamber cannot compel the person or entity to appear as a witness or answer questions relating to the information or its origin. As seen in *Prosecutor v. Blăkić*, an ICTY trial chamber strictly limited the defense's ability to cross-examine such a witness or to obtain classified documents related to the evidence provided by the witness.[179] In striking a balance between the accused's right be able to prepare his defense and the need to protect state secrets, courts recognize the need to limit disclosure of protected information.

Comparison with Minimum International Standards – Protection of Information

Limits on disclosure of protected information have the potential for violating the accused's right to have adequate facilities to prepare his defense, under AP I and the ICCPR.[180] According to the Human Rights Committee, this protection must include access to documents and other evidence which the accused "requires" to prepare his case.[181] Along this line, the Committee expressed concern that in Japan, the prosecutor has no obligation to disclose information other than the evidence it intends to offer at trial. The Committee recommended that Japan amend its laws and practices to enable the accused to have access to all "relevant" material, in accordance with ICCPR art 14(3).[182] Yet, some limits on access to information are permissible. The ICCPR speaks of "adequate" facilities, not "all" facilities; the Committee interprets this to only include "required" and "relevant" information. Further, humanitarian law recognizes that state security concerns may require *in camera* review of evidence.[183]

Recommendation for Fixing the Rule to Meet Minimum International Standards

The military rules for protected information probably do not violate minimum international standards of humanitarian and human rights law. A balance between national security interests and

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[179] Prosecutor v. Blăkić, *Decision of Trial ChamberI on the Prosecutor's Motion for Video Deposition and Protective Measures*, IT-95-14-T (Nov. 11, 1997).

[180] AP I art. 75(4)(a), ICCPR art. 14(3)(b).

[181] General Comment 13, para. 9.

[182] Concluding Observations of the Human Rights Committee: Japan, CCPR/C/79/Add. 102 (1998).

[183] GC III Commentary, 492.

protection of the accused is not easy, but MCO No. 1 does not unfairly prejudice the accused by limiting the disclosure of protected information. The rules are similar to other judicial systems' limits on disclosure of particular information, and do not foreclose the defense from getting required and relevant evidence. An accused is always entitled to the facts at issue, and the defense will receive the evidence actually considered by a commission. The rules on protected information are further tempered when read in context with section 5 of the Order, which afford the accused a right to access evidence.

As with the exclusion of the accused from proceedings, the problem of the need for an independent detailed defense counsel reappears. Fix the problem of the Appointing Authority's control over military defense counsel to enable detailed defense counsel to be able to independently prepare an adequate defense, free from actual or appearance of command influence. This mitigates, but does not fully correct, the inability of the detailed defense counsel to communicate with the client or civilian counsel about substance of protected information.

Sections 6.E-G: Findings and Sentence

The proceedings during trial as set forth in MCO No. 1, Sections 6.E-G, are essentially the same as those of U.S. courts-martial. Relevant to international standards for the protection of the accused are the military commission's procedures for voting on and announcing the findings and sentence. These procedures adequately protect the integrity of the commission's deliberative process (without taking into account other problems with the commission's independence) and protect the accused's right to a public announcement of his judgment.

The MCO Rule

After the prosecution and defense have presented their cases during the findings portion of the trial, the commission members retire to deliberate and vote in closed conference.[184] MCO No. 1 requires

[184] MCO No. 1 § 6.E.

that a member must vote "not guilty" on an offense unless convinced beyond a reasonable doubt that the accused is guilty of the offense. A vote of "guilty" is required from two-thirds of the members for a finding of "guilty" on an offense. The commission may alter a charge by exceptions and substitutions or find the accused guilty of a lesser-included offense, but cannot substantively change the nature of the charge or increase its seriousness. Votes are taken by secret, written ballot.[185]

After the commission has made a decision on findings, the Presiding Officer announces the commissions findings in the presence of the commission, the prosecution, the accused, and defense counsel. Individual votes will not be disclosed.[186]

If the commission has found the accused to be guilty of one or more of the charged offenses, the trial moves into the sentencing phase.[187] After the prosecution and defense have presented information to aid the commission in determining an appropriate sentence, the commission again retires behind closed doors for deliberation and voting, this time on the sentence. Except for the death penalty, a vote by two-thirds of the members results in the commission's sentence. Like findings, votes on sentence are secret and in writing.[188] The most serious of penalties, death, is likely to be a possible sentence for most of the charges brought against persons tried by military commissions. MCO No. 1 expressly authorizes a military commission to impose the death penalty. A commission may impose the death penalty only if the commission consists of seven members and those members vote unanimously for death.[189]

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[185] MCO No. 1 § 6.F.

[186] MCO No. 1 § 6.E.

[187] *Id.*

[188] MCO No. 1 § 6.F.

[189] MCO No. 1 § 6.G. Seven is the maximum number of members on a military commission. MCO No. 1 § 3.A. The American Bar Association suggests that this requirement meets due process requirements. *See supra*, note 4.

After the commission has made a decision on a sentence, the Presiding Officer announces the commissions findings in the presence of the commission, the prosecution, the accused, and defense counsel. Individual votes will not be disclosed.[190]

Comparison with Minimum International Standards

The military commission procedures for announcing the judgment and sentence meet minimum international standards under AP I art 75 and the ICCPR art 14 for public announcement of the judgments.[191] Both AP I and the ICCPR recognize the importance of this right for the accused. It is another element of transparency permitting the public to scrutinize the tribunal, an "essential element of fair justice", even if the proceedings are closed.[192] Even in the case where the military commission has closed significant portions of the proceedings, no valid reason can exist for hiding the judgment and sentence from the accused and public. Beyond opening the tribunal for the announcement of the judgment, the Human Rights Committee has interpreted the right to public judgement to require that judgment be in writing, thus preserving the holdings of the tribunal for examination.[193] Military commission proceedings, including announcement of findings and sentence, are to be recorded verbatim and assembled into a record of trial.[194] A key element of transparency, not only in relation to the judgment, is a record of trial available to the public, except for those parts strictly necessary for the protection of information or the safety of personnel.

The military commission's ability to impose the death penalty does not trigger additional rights for an accused, but humanitarian and human rights law recognizes the imperative for heightened safeguards to protect the unjust imposition of this ultimate punishment. Although AP I is silent on this

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[190] MCO No. 1 § 6.E.

[191] AP I art. 75(4)(i), ICCPR art. 14(1).

[192] AP I Commentary, para. 3118.

[193] Luis Touron v. Uruguay, Communication No. R.7/32, U.N. Doc. A/36/40 at 120 (1981).

[194] MCO No. 1 § 6.H(1).

issue, GC III requires detailed reporting to the Protecting Power of the particulars of a death sentence and a six month delay prior to the execution of the sentence for those convicted of grave breaches.[195] Article 6 of the ICCPR provides that a "sentence of death may be imposed only for the most serious crimes.... Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence."[196] Military Commission Order No. 1 recognizes the severity of the death penalty and requires a unanimous vote by a seven-member commission to impose this sentence. Further, the President's Order specifically keeps the power to grant reprieves or pardons with the President.[197] These procedures satisfy the need for heightened safeguards needed for death penalty cases.[198]

Section 6.H: Post-Trial Review and Final Decision

The MCO Rule

After a trial by a military commission, MCO No. 1 provides for a review process of the commissions' proceedings, findings, and sentence before the case goes to the President for a final decision. The Presiding Officer ensures that a complete record of trial is transmitted to the Appointing Authority. If the Secretary of Defense is the Appointing Authority, he forwards the record of trial directly to the review panel, discussed below. Otherwise, the Appointing Authority performs an administrative review of the record of trial. If the proceedings are administratively complete, the Appointing Authority forwards the record to the review panel; if not, the Appointing Authority returns the record to the commission for correction.[199]

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[195] GC III art 101, 107. A narrow reading of the Geneva Conventions suggests that GC III art 101, requiring a six month delay prior to execution, does not apply to persons convicted of grave breaches but not entitled to POW status. However, the Commentary clearly ties the reporting requirement of art 107 with the delay requirement of art 101. CG III Commentary 498.

[196] ICCPR art. 6(2), 6(4).

[197] President's Order § 7(a)(2).

[198] *See* ABA Report and Human Rights Watch, both *supra* note 4.

[199] MCO No. 1 §§ 6.H(1), 6.H(3).

The review panel will consist of three military officers appointed by the Secretary of Defense. Civilians may be commissioned as officers to serve on the review panel, and at least one member of the panel must have experience as a judge. The review panel will review the record of trial and may consider post-trial submissions from the prosecution and defense. The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission."[200] After review, the panel can do one of two things: forward the case to the Secretary of Defense with recommendations as to the disposition of the case, or return the case to the Appointing Authority for further proceedings if a material error of law has occurred.[201]

Upon receiving the case from the review panel, the Secretary of Defense can either return the case for further proceedings or forward the case with his own recommendation to the President. The President may delegate final decision-making authority to the Secretary of Defense.[202]

The President (or, if delegated, the Secretary of Defense) is personally responsible for the final decision on a military commission case. He must review the record of trial and all recommendations prior to making a final decision. After review, the President "may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed of any portion thereof."[203] At no step in the review process can anyone change a military commission's finding of "not guilty" to a finding of "guilty."[204] The decision by the President is final and the President's Order purports to prevent any further review of the military

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[200] *Id.* at § 6.H(4).

[201] *Id.*

[202] *Id.* at § 6.H(5), *citing* President's Order § 4(c)(8).

[203] *Id.* at § 6.H(6).

[204] *Id.* at § 6.H(2).

commission or the President's decision.[205] The President's Order and MCO No. 1 exclude any appellate review by the judiciary.

Comparison with Other Tribunals

Civilian and military courts throughout the world have procedures for judicial review of trial court judgments. The U.S. court-martial review process includes automatic appeals of serious cases to a military appellate court, and the opportunity for appeal to a civilian Court of Appeals for the Armed Forces and ultimately to the U.S. Supreme Court.[206] The military judges assigned to the military appellate courts have all of the protections of independence afforded to military trial judges under UCMJ, Rules for Courts-Martial, and service regulations, as described in the analysis of the military commission Presiding Officer, earlier in this paper. These protections are carefully guarded by the courts above. The Court of Appeals for the Armed Forces consists of five civilian judges appointed for 15-year terms by the President with advice and consent of the Senate.[207] These appellate courts review matters of fact and law and can set aside a lower court's findings and sentence and remand for proceedings or dismiss the charges outright.[208] At no point can a higher court or convening authority change findings to guilt of a more serious crime or increase a sentence determined by a lower court or convening authorities.[209] Finally, the convening authority may not take final action until the appellate process is complete.[210]

The ICTY has a separate Appellate Chamber that reviews issues of law and fact.[211] All ICTY judges are elected by the U.N. General Assembly from a list submitted by the Security Council, then the

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[205] *Id.*; President's Order § 7(b)(2).

[206] 10 U.S.C. §§ 866-867a (UCMJ art. 66-67a).

[207] 10 U.S.C. § 942.

[208] 10 U.S.C. §§ 866-867a (UCMJ art. 66-67a).

[209] 10 U.S.C. §§ 860, 866, 867, 876 (UCMJ art. 60, 66, 67, 76)

[210] R.C.M. 1209.

[211] ICTY Statute art. 12-14, 25.

President of the Tribunal assigns judges to either a Trial Chamber or the Appellate Chamber.[212] Thus, the judges are part of the same body, unlike the separation of trial and appeals bodies found in U.S. practice. The Appellate Chamber may affirm, reverse, or revise the Trial Chambers' decisions.[213] The examples of the U.S. courts-martial and the ICTY highlight widely different means for selecting judges, levels of review available to the accused, and appellate procedures.

Comparison with Minimum International Standards – Additional Protocol and the ICCPR

Neither AP I nor the ICCPR require, as a fundamental guarantee for the accused, a particular form of appellate review. In fact, article 75(4) of AP I has no requirement for appellate review of criminal convictions, just a requirement that the accused be notified of any review process available to him.[214] The ICRC Commentary to AP I notes some states limit judicial appeal of penal judgments and other remedies include pardon, reprieve, or the need for a superior military authority to confirm a trial court judgement.[215] Article 6 of Additional Protocol II on internal armed conflicts sets for the same notice requirement as AP II article 75. The ICRC Commentary to AP II recognizes that under international humanitarian law, "a principle to the effect that everyone has a right of appeal against sentence pronounced upon him" is not realistic in light of state practice.[216] The protection afforded to the accused is the right to be notified of and have access to any existing review process.

Both Additional Protocols to the Geneva Conventions were drafted after the ICCPR, and the drafters of the protocols had the ICCPR as a human rights model. As this paper has concluded earlier, the

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[212] *Id.* at art. 13-14.

[213] *Id.* at art. 25.

[214] AP I art. 75(4)(j).

[215] AP I Commentary para. 3121.

[216] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) at para. 4611, *available at* http://www.icrc.org/eng/ihl.

resulting judicial guarantees of AP I are generally equivalent to those of the ICCPR.[217] A more recent, but non-binding, list of minimum humanitarian standards is found in the Turku Declaration. Article 9 of his declaration tracks closely the judicial guarantees of AP I. Like AP I, the Turku Declaration lists no right of judicial review.[218] Further analysis of the ICCPR reveals that both AP I and the ICCPR provide for only a limited right of appeal.

Article 14(5) of the ICCPR gives the accused the right to have his conviction and sentence reviewed by a "higher tribunal according to law." Many interpret this to require an appellate review a tribunal separate from the executive branch of government. For example, Human Rights Watch says that the military commission rules, while providing many fair trial guarantees, fail to meet the human rights requirement of appellate review by not permitting review by civilian appellate courts.[219] European human rights bodies would almost certainly find that the military commission process is defective, in part because neither has Congress passed legislation covering the appellate process nor do the rules permit review by the established courts. The European Commission and Court of Human Rights interpret "law" as necessarily being "legislation."[220] These interpretations of the accused's right to an independent appellate process have merit, especially in light of the real concerns about the independence of the military commission and review panel members.

However, another valid view is that the ICCPR does not require any *particular* review process, such as civilian review of military trial courts or necessarily the separation of the appeal from the executive. This interpretation of a review by a "higher tribunal according to law" focuses on the procedures – not the entities – that guarantee the accused a fair an impartial review. The Human Rights

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[217] AP I Commentary para. 3092. The ICCPR was adopted in 1966, the Additional Protocols in 1977.

[218] *Supra*, note 39.

[219] Human Rights Watch, *supra*, note 4.

[220] *Supra*, note 15.

Committee generally supports this view. In General Comment 13 on ICCPR article 14, after noting that review must be available for all criminal convictions, the Committee focuses on the

> procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgment, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.[221]

Further, in a series of cases involving the Jamaican courts, the Committee has provided guidance on meeting the review requirements of the ICCPR. A state is obliged to substantially review the conviction and sentence.[222] However, the ICCPR does not require several levels of appeal. It does require effective access to the review process and written, duly reasoned appellate judgments.[223] In addition, the accused is entitled to a defense counsel during the appeal process.[224] The key is an appellate review that provides the fundamental guarantees afforded to the accused at every stage of the process.

The ICTY's interpretation of "law" in the context of ICCPR article 14 also supports the view that the right to an appeal hinges on the process and not the institution. In *Prosecutor v. Tadić*, the Appellate Chamber choose to not follow the European human rights bodies' restrictive interpretation of "law." Instead, the ICTY looked to conformity with internationally recognized human rights instruments that provide judicial guarantees. The criteria for lawfulness is that the procedure be established under appropriate procedures and provide necessary safeguards of fair trial.[225] This focus on procedures and not institutions suggests that, under the ICCPR military commissions do not necessarily require review by U.S. courts.

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[221] General Comment 13 para. 17.

[222] Reid v. Jamaica, Communication No. 250/987, U.N. Doc. A/45/40, vol. 2 at 85 (1990).

[223] Henry v. Jamaica, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987 (1991).

[224] Daley v. Jamaica, Communication No. 750/1997, U.N. Doc. CCPR/C/63/D/750/1997 (1998); Campbell v. Jamaica, Communication No. 248/1987, U.N. Doc. CCPR/C/44/D/248/1987 (1992).

[225] *Supra*, note 15 at para. 47.

Comparing with Minimum International Standards – The Third Geneva Convention

A critical component for analyzing the review process set forth in MCO No. 1 is the additional review requirement placed on the United States by article 106 of GC III, when the accused is charged with grave breaches of the Geneva Conventions. This provision applies to all persons, regardless of their status. Article 106 provides that every accused "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him".[226] This statement supports the assertion that accused tried by military commissions of grave breaches have the right to a review process like the U.S. courts-martial appeal process, which includes review by civilian courts. Although the Commentary to GC III suggests that the drafters of this article did not intend to give the accused access to "certain means of appeal which are available only to nationals of the country concerned"[227], the UCMJ provides for courts-martial of non-nationals. Specifically, persons subject to courts-martial, including the appeals process, include "[p]risoners of war in custody of the armed forces", and "any person who by the law of war is subject to trial by military tribunal for any crime or offense against...the law of war".[228] Article 106 appears to apply to accused before military commissions on charges of grave breaches of the Geneva Conventions, in addition to the minimal protections found in AP I or the ICCPR.

In summary, AP I does not require appellate review of criminal convictions. Article 75(4)(j) only requires notice of and access to any available remedy. The ICCPR gives the accused the right to a review by a higher tribunal, but this guarantee is not a right to a particular form or institution. Article 14(5) only requires that a review process is available and that the process meets the general requirements for a full and fair trial as set forth in article 14(3). Finally, for persons accused of grave breaches of the Geneva

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[226] GC III art. 106.

[227] CG III Commentary 493, *citing* Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, *Report on the Work of the Conference of Government Experts* 228 (1948).

[228] 10 U.S.C. 802(a)(9) (UCMJ art. 2(a)(9)); RCM 201(f)(1)(B).

Conventions, GC III article 106 gives the accused the right to an appeal process "in the manner of" the process afforded to U.S. service members.

Applying Additional Protocol I and the ICCPR Standards for Review to the MCO

Momentarily setting aside the requirement of GC III article 106, AP I and the ICCPR can be reasonably interpreted to find that limiting review of a military commission trial to institutions of the executive branch does not, alone, violate the accused's fundamental rights. A strict application of AP I, without considering human rights law, requires no review process at all for military commissions. Under the ICCPR, the review of military commission trials is "according to law" if the process for the review panel and reviewing authorities provide the necessary safeguards. Military Commission Order No. 1, section 6.H., provides some of the safeguards the Human Rights Committee determined are necessary to comply with ICCPR article 14(5). All military commission trials are to be substantively reviewed by the President, Secretary of Defense, and most importantly, the review panel. The accused will be represented by counsel during the review process, and, at the review panel's, discretion, may submit materials for consideration to the review panel. No action by the review panel, Appointing Authority, Secretary of Defense, or President can increase the level of guilt or sentence of the accused as determined by the military commission. Finally, the accused may request that the President grant a pardon or reprieve.

In light of AP I and the ICCPR, three fundamental guarantees are missing from the MCO No. 1 review process. First, the accused lacks access to the review panel, Secretary of Defense, and President. The accused has a right under the ICCPR to submit matters to each of these reviewing authorities. Next, the review panel is not required to provide written recommendations for the disposition of cases. Written recommendations from the review panel are necessary for the accused and the public to scrutinize the review process, to see the legal basis for the panel's decisions and to determine whether the President complies with the panel's recommendations. Finally, the pervasive problem of MCO No. 1 surfaces again, lack of independence of the tribunal. The lack of independence of the review panel sinks the entire review process. Under AP I and the ICCPR, the direct, nearly unlimited control by the Secretary of

Defense over the selection and appointment of the review panel is unacceptable and a *prima facie* violation of the fundamental guarantee to a trial by an independent tribunal.

Applying the Third Geneva Convention Standards for Review to the MCO

Article 106 of GC III adds another dimension to the problem, one that cannot be remedied within MCO No. 1. If accused coming before military commissions were not to be tried for grave breaches, the MCO No. 1 review process could be fixed within the Department of Defense to meet minimum international guarantees. Yet, how could those subject to the President's Order *not* be charged with grave breaches of the laws of war? These charges trigger the protections of GC III article 106. A fundamental characteristic of the U.S. court-martial process is that it permits appeal to a civilian judicial body. Like U.S. courts-martial, military commissions must have a review process that includes the right of appeal to a U.S. civilian court. To meet the requirement of GC III article 106, the President must relinquish control over the military commission review process and hand it over to the courts.

The prohibition of recourse to U.S. courts is a violation of CG III article 106. This failure to provide a suitable review process is the primary defect in MCO No. 1., and in that respect, Human Rights Watch is correct: "The rules...fail to meet the core human rights requirement of appellate review by an independent and impartial court."[229]

Recommendations for Fixing the Rule to Meet Minimum International Standards

Except for the requirement of GC III article 106, the military commission's lack of independence and less insidious problems with the review process can be cured through amending or supplementing MCO No. 1. As suggested earlier, a reasonable interpretation of the ICCPR is that the review process does not have to be separated from the executive branch if the process truly affords the safeguards necessary for a full and fair trial. It is possible to have a review process that is both is and appears to be fair to the accused.

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[229] Human Rights Watch, *supra* note 4.

The threshold question is whether military commissions as established by the President's Order and MCO No. 1 are legally established under U.S. law; in the words of the ICTY, have military commissions been "set up by a competent organ in keeping with the relevant legal procedures"?[230] A tribunal that does not meet the domestic requirements for being a lawful entity cannot meet the ICCPR requirements of being a "higher tribunal according to law." This paper has proceeded throughout with the assumption that the establishment of military commissions meets these criteria, and an analysis of this issue is beyond the scope of the paper. The following recommendations for changes will continue to assume that the President's Order and MCO No. 1 meet U.S. legal standards for the establishment of military commissions.

First, the rules should be amended or supplemented to reduce the chance of influence of the Secretary of Defense over the review panel and to enhance the credibility of the panel. The rules should provide for all of the persons on the review panel to have experience as a judge, to be non-partisan distinguished persons of high moral character, impartiality, and integrity,[231] and to be civilians temporarily commissioned for the sole purpose of serving on the review panel. Furthermore, the rules should establish a nomination process that independently provides the Secretary of Defense with a list of qualified persons. It might be possible to enlist the aid of the federal judiciary or American Bar Association to provide such a list. Such a process for choosing the review panel, set forth in the rules and open for the public to see, would go a long way in establishing the independence needed to meet minimum international standards.

Second, the rules should set up a review panel with the authority to set aside findings and modify sentences based on its review of the record of trial. An appropriate model for the military commission review panel is the U.S. court of criminal appeals, as set forth in UCMJ article 66.[232] As with the courts

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[230] *Supra* note 15 at para 45.

[231] *See* ICTY Statute art. 13.

[232] 10 U.S.C. § 866 (UCMJ art. 66).

of criminal appeals, the review panel would review the record of trial *de novo*. The President would be obligated to make his final decision in accordance with the review panel's findings. This important change to MCO No. 1 would complete the modifications necessary to make the review panel independent under minimum international standards set forth by the ICCPR.

Third, the rules should require written opinions and recommendations from the review panel. Subject to the need to protect sensitive information or the safety of personnel, the opinions should be available to the public. Written, reasoned opinions would provide legitimacy to the military commission and give both the accused and the public access to the review process. In addition to being a requirement of the ICCPR, written opinions would provide interpretations of an area of the law that is lacking in judicial decisions.

Fourth, MCO No. 1 should be amended to enhance the accused's access to each stage of the review process. Instead of discretionary, the rules should require the review panel to accept and consider written submissions from the accused. In addition, prior to a final decision, the rules should permit the accused to submit matters to the President. The model for this UCMJ article 60, which allows an accused to submit matters for consideration by the convening authority. When submitted in a timely manner, the convening authority must consider the matters before taking action on a case.[233] These rules would ensure that the accused would have meaningful access to the review process, meeting the requirements of the ICCPR.

Finally, and possibly most important conclusion of this paper, the President must find a way to permit those convicted by military commissions some recourse to U.S. courts. To comply with international law it is necessary to comply with the Geneva Convention III article 106 rule that the accused has a right to an appeal process "in the same manner" as U.S. service members. This fix, however, involves issues of U.S. Constitutional law, separation of powers, and politics beyond the scope

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[233] 10 U.S.C. § 860 (UCMJ art. 60). RCM 1105.

of this paper. For example, even if he wanted to, could the President grant the accused access to U.S. federal courts? In passing laws authorizing judicial oversight of executive agencies, Congress has specifically excluded judicial review of military commissions.[234] How involved must Congress be to permit the accused some recourse to U.S. courts? Could or would the courts exercise any U.S. Constitution Article III authority over military commissions, even the limited review provided by habeas corpus jurisdiction? Which courts would be appropriate: certain U.S. District Courts, a particular Circuit Court?

Unfortunately, this most important fix opens up the most complex issues of domestic law and politics. At this point in time, it is unrealistic to believe that the President will take this issue to Congress or the courts. Nevertheless, the other recommendations of this paper *are* realistic and workable within the Department of Defense. Implementing these recommendations will go a long way towards bringing military commission rules and procedures into compliance with minimum international standards for the protection of the accused, without unduly restricting the government's ability to prosecute persons subject to the President's Order for serious war crimes.

[234] *See* 5 U.S.C. §§ 551, 701.

V.

CONCLUSION: MILITARY COMMISSION CAN BE FIXED TO MEET INTERNATIONAL STANDARDS

"[S]ome general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced." Robert H. Jackson, Opening Statement for the U.S. at the Nuremberg Military Tribunal, November 21, 1945 [235]

Military commissions are poised to try individuals for the most serious crimes. The members of these commissions will vote on life-and-death matters. Every person before these tribunals must be afforded basic protections of the law, regardless of his status or the immensity of the crime for which he is accused. The United States may require an exceptional tribunal with exceptional procedures to effectively prosecute international terrorists. However, the U.S. must accept, even welcome, exceptional scrutiny from the world because of the inherent danger of such tribunals.

Military Commission Order No. 1 provides a foundation upon which military commission rules and procedures can be established to comply with minimum international standards. They can be structured to give the accused a full and fair trial, in appearance and in reality. Most of the problems found in MCO No. 1 can be fixed by amending or supplementing the rules. The Department of Defense ***can*** create a tribunal and defense counsel that are independent and impartial. Further, the executive branch ***can*** significantly mitigate the lack of an independent review process.

As important as actually fixing the rules and procedures is ensuring that they are as transparent as possible. The Department of Defense must publish the rules, publicize them, educate, and be open to critical review. The military commissions must be as open as possible, with public access through the media and published records of trial. These efforts can show, in the long run, that U.S. military commissions are appropriate and legitimate means for bringing international terrorists to justice – full, fair, impartial justice.

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[235] ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS: OPENING STATEMENT FOR THE UNITED STATES OF AMERICA 6 (1946).

The tough question, left unanswered by this paper, is how to fix the most important problem: providing the accused with recourse to the U.S. judicial system.

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